

process to work in the best traditions of the Senate and in the best traditions of our democracy. In fact, I've been accused on more than one occasion of being overly fair to the president's nominations.

It is with this background that I state my belief that recent events relating to U.S. attorney dismissals and replacements are unacceptable and should be unacceptable to all of us.

Now, I would like to speak specifically about the facts that occurred regarding the U.S. attorney replacement for the Eastern District of Arkansas. In the summer of 2006, my office was told by reliable sources in the Arkansas legal and political community that then-U.S. Attorney Bud Cummins was resigning and the White House would nominate Mr. Tim Griffin as his replacement. I asked the reasons for Mr. Cummins' leaving and was informed that he was doing so to pursue other opportunities.

My office was later told by the administration that he was leaving on his own initiative and that Mr. Tim Griffin would be nominated. I did not know Mr. Griffin, but I spoke to him by telephone in August 2006 about his potential nomination. I told him that I know many lawyers in the state but I knew very little about his legal background. In other words, I did not know if he was qualified or if he had the right temperament or if he could be fair and impartial. I informed him that I would have trouble supporting him until the Judiciary Committee had reviewed these issues. I told him if he were to be nominated that I would evaluate my concerns in light of the committee process.

It should be noted that around this time, it was becoming clear that Mr. Cummins was being forced out, contrary to what my office had been told by the administration.

Sometime after the interview with Mr. Griffin, I learned that there were newspaper accounts regarding his work on behalf of the Republican National Committee about efforts that had been categorized as "caging African-American votes." This arises from allegations that Mr. Griffin and others in the RNC were targeting African-Americans in Florida for voter challenges during the 2004 presidential campaign.

I specifically addressed this issue to Mr. Griffin in a subsequent meeting. When I questioned him about this, he provided an account that was very different from the allegation. However, I informed him that due to the seriousness of the issue, this is precisely the reason why the nomination and confirmation process is in place. I told him I would not be comfortable until this committee had thoroughly examined his background. Given my concerns over this potential nominee, I as well as others protested, and Mr. Cummins was allowed to stay until the end of the year.

Rumors began to circulate in October of 2006 that the White House was going to make a recess appointment which, of course, I found troubling. This rumor was persistent in the Arkansas legal and political community. I called the White House on December 13, 2006 to express my concerns about a recess appointment and spoke to then-White House Counsel Harriet Myers. She told me that she would get back to me on this matter. I also called Attorney General Gonzales expressing my reservations. And he informed me that he would get back to me as well.

Despite expressing my concerns about a recess appointment to the White House and to the attorney general, two days later, on December 15, 2006, Ms.

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Myers informed me that Mr. Griffin was their choice. Also on that same day, General Gonzales confirmed that he was going to appoint Mr. Griffin as an interim U.S. attorney. Subsequently, my office inquired about the legal authority for the appointment and was informed it was pursuant to the amended statute in the Patriot Act.

Before I say any more, I need to tell the committee that I respect and like General Gonzales. I supported his confirmation to be attorney general. I have always found him to be a straight shooter. And even though I disagree with him on this decision, it has not changed my view of him. I suspect he is only doing what he has been told to do. On December 20, 2006, Mr. Cummins' tenure as U.S. attorney was over. On that same day, Mr. Griffin was appointed interim U.S. attorney for the eastern district of Arkansas. The timing was controlled by the administration. On January 11, 2007, I wrote a letter to General Gonzales outlining my objections with regard to this appointment. First, I made clear my concern as to how Mr. Cummins was summarily dismissed. Second, I outlined my amazement as to the excuse given as the reason for the interim appointment which was due to the first assistant being on maternity leave. Third, I objected to the circumventing of the Senate confirmation process.

The attorney general's office responded on January 31, 2007 denying any discrimination or wrongdoing. I will address these issues now.

As more light was shed on the situation in Arkansas, it became clear that Bud Cummins was asked to resign without cause so that the White House could reward the Arkansas post to Mr. Griffin. Mr. Cummins confirmed this on January 13, 2007 in an article in the Arkansas Democrat-Gazette newspaper wherein he said he had been asked to step down so the White House could appoint another person. By all accounts, Mr. Cummins' performance has been fair, balanced, professional and just. Lawyers on both sides of the political spectrum have nothing but positive things to say about Mr. Cummins' performance. During his tenure, he established a highly successful anti-terrorism advisory council that brought together law enforcement at all levels for terrorism training. In the area of drug prosecutions, he continued at historic levels of quality, complex and significant Organized Crime Drug Enforcement Task Force drug prosecutions. He also increased federal firearm prosecutions, pursued public corruption and cyber crime investigations and led to lengthy prison sentences for those convicted.

In addition, I understand that his performance evaluations were always exceptional. On this last point, I would ask the committee to try to gather the service evaluations of Mr. Cummins and the other dismissed U.S. attorneys to determine how they were perceived by the Justice Department as having performed their jobs.

The reason I'm reciting Mr. Cummins' performance record is that it stands in stark contrast to General Gonzales' testimony before this committee when he stated, quote, "Some people should view it as a sign of good management. What we do is make an evaluation about the performance of individuals, and I have a responsibility to the people in your districts that we have the best possible people in these positions.

And that's the reason why changes sometimes have to be made. Although there are a number of reasons why changes get made and why people leave on their own, I think I would never, ever make a change in the United States attorney position for political reasons, or if it would in any way jeopardize an ongoing serious investigation. I just would not do it." End quote.

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The attorney general then refused to say why Mr. Cummins was told to leave. However, it is my understanding that in other cases around the country, Justice Department officials have disclosed their reasoning for firing other U.S. attorneys. The failure to acknowledge that Bud Cummins was told to leave for a purely political reason is a great disservice to someone who has been loyal to the administration and who performed his work admirably. I have discussed in detail the events surrounding Mr. Cummins' dismissal. Now I would like to discuss the very troubling pretense for Mr. Griffin's appointment to interim U.S. attorney over the first assistant U.S. attorney in the Little Rock office.

The Justice Department advised me that normally, the first assistant U.S. attorney is selected for the acting appointment while the White House sends their nominee through the Senate confirmation process. This is based on 5 U.S.C., Section 3345A1. However, in this case the Justice Department confirmed that the first assistant was passed over because she was on maternity leave. This was the reason given to my chief of staff, as well as comments by the Justice Department spokesman Brian Rorchast (sp) -- and I'm not sure if I pronounced that name correctly -- wherein he was quoted in newspapers as saying, "When the U.S. attorney resigns, there is a need for someone to fill that position." He noted that often the first assistant U.S. attorney in the affected district will serve as the acting U.S. attorney until the formal nomination process begins for the replacement. "But in this case, the first assistant is on maternity leave." That's what he said.

In addition, this reason was given to me specifically by a Justice Department liaison at a meeting in my office. In my letter to the attorney general, I stated that while this may or may not be actionable in a public employment setting, it clearly would be in a private employment setting. Of all the agencies in the federal government, the Justice Department should not hold this view of pregnancy and motherhood in the workplace. I call this a pretense because it has become clear that Mr. Griffin was always the choice to replace Mr. Cummins. Before I close, let me address the circumvention of the Senate's confirmation process. General Gonzales has said that it is his intention to nominate all U.S. attorneys, and -- but that does not water in Arkansas. For seven months now, the administration has known of the departure of Mr. Cummins. Remember, they created his departure. It has now been 49 days since Bud Cummins was ousted without cause. If they were serious about the confirmation process, I cannot believe that it would have taken so long to nominate someone.

Now to be fair, in my most recent telephone call with General Gonzales, he asked me whether I would support Tim Griffin as my nominee for this position. I thought long and hard about this, and the answer is I cannot. If nominated, I would do everything I could to make sure he has an opportunity to tell his side of the story regarding all allegations and concerns to the committee, and I would ask the committee to give Mr. Griffin a vote as quickly as possible. It is impossible for me to say that I would never support his nomination because I do not know all the facts. That is why we have a process in the Senate. I know I would never consider him as my nominee because I just know too many other lawyers who are more qualified, more experienced and more respected by the Arkansas bar. I will advise General Gonzales about this decision shortly.

Regardless of the situation in Arkansas, I am convinced that this should not happen again. I'm also convinced that the administration and maybe future administrations will try to bypass the Senate unless we change this law. I do not say this lightly. Already a challenge has been made to the appointment

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of Mr. Griffin in Arkansas as violating the U.S. Constitution because it bypassed Senate confirmation. While I have not reviewed the pleadings filed in this case -- I believe it's a capital murder case, I don't know all the situation there -- but I have not reviewed the pleadings there, I have read a recent article in the Arkansas Democratic Gazette that concerns me.

It is reported that, quote, "because United States attorneys are inferior officers, the appointment clause of the Constitution expressly permits Congress to vest their appointments in the Attorney General and does not require the advice and consent of the Senate before they're appointed," end quote. Please do not miss this point. The Justice Department has now pleaded in court that U.S. attorneys, as a matter of constitutional law, are not subject to the advice and consent of the United States Senate.

After a thorough review by this committee, I hope that you will reach the same conclusion I have, which is this. No administration should be able to appoint U.S. attorneys without proper checks and balances. This is larger than party affiliation or any single appointment. This touches our solemn responsibility as senators. I hope this committee will address it by voting for S.214, which I join in offering along with Senators Feinstein and Leahy. Thank you, Mr. Chairman.

SEN. SCHUMER: Thank you very much, Senator Pryor, for your really outstanding testimony. And we will pursue many of the things you bring up. I know that you have a busy schedule, and I would ask the indulgence of the committee that if we have questions of Senator Pryor, we submit them in writing. Would that be okay?

SEN. LEAHY: Well, Mr. Chairman, may I just ask one or two questions?

SEN. SCHUMER: Sure.

SEN. LEAHY: Thank you. (Cross talk.)

Senator Pryor, do you think that Mr. Griffin is not qualified for the job?

SEN. PRYOR: It's hard for me to say whether he is or isn't because I just know so little about his background. When I met with him, we talked about this, and I told him that it was my sincere hope that they nominate him so he could go through the process here. But it's impossible for me to say whether he is or isn't because I know so little about him. And just by the way of background on him, and this is probably more detail than the committee wants, is that he went to college in Arkansas, and then he went off to Tulane Law School in Louisiana. And then, more or less, he didn't come back to the state, I think he did maybe a year of practice in the U.S. attorney's office at some point, but basically he's -- his professional life has been mostly outside the state. So he's come back in, and the legal community just doesn't know him.

SEN. LEAHY: Well, fair enough. Do you think it ought to be a matter for the committee? I think that's the traditional way.

SEN. PRYOR: Certainly.

SEN. LEAHY: Do you think that his having worked for the Republican National Committee -- RNC -- or that he may be a protege' of Karl Rove is relevant in any way as to his qualifications?

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SEN. PRYOR: To me, it I not relevant. I think we all come to these various positions with different backgrounds, and certainly if someone works for a political committee or a politician or an administration -- that doesn't concern me. Some of the activities that he may have been involved in do raise concerns. However, when I talked to him about that, he offered an explanation, like I said, that was very different than the press accounts of what he did. And here again, that takes me back to the process. That's why we have a process. Let him go through the committee, let you all and your staffs look at it, let him -- let everybody evaluate that and see what the true facts are. SEN. LEAHY: Well, fair enough. The activities may bear. His conduct bears on his qualifications, but just the fact of working for the Republican National Committee and for Karl Rove is not a disqualifier.

SEN. PRYOR: No, not in my mind it's not.

SEN. LEAHY: Thank you very much for coming in, Senator Pryor. We know how busy you are, and you've made a very comprehensive analysis, and it's very helpful to have a senator appear substantively --

SEN. PRYOR: Thank you.

SEN. LEAHY: -- so thank you.

SEN. PRYOR: Thank you.

SEN. SCHUMER: Thank you, Senator Pryor. Any further questions?

Thank you so much.

Okay, our next witness is the honorable Paul J. McNulty. He's the deputy attorney general of the United States. He has spent almost his entire career as a public servant, with more than two decades of experience in government at both the state and federal levels. Just personally, Paul and I have known each other. When he served in the House, I knew him well. We worked together on the House Judiciary Committee. He's a man of great integrity. I have a great deal of faith in him and his personality, and who he is and what he does. From 2001 to 2006, of course, he served as U.S. attorney for the Eastern District of Virginia.

(The witness is sworn in.)

MR. MCNULTY: Thank you, Mr. Chairman, and thank you for your kindness.

I appreciate the opportunity to be here this morning and attempt to clear up the misunderstandings and misperceptions about the recent resignations of some U.S. attorneys, and to testify in strong opposition to S. 214, a bill which would strip the Attorney General of the authority to make interim appointments to fill vacant U.S. attorney positions.

As you know and as you've said, Mr. Chairman, I had the privilege of serving as United States Attorney for four and a half years. It was the best job I ever had. That's something you hear a lot from former United States attorneys -- "best job I ever had." In my case, Mr. Chairman, it was even better than serving as counsel under your leadership with the Subcommittee on Crime. Now why is it -- being U.S. Attorney -- the best job? Why is it such a great job? There are a variety of reasons, but I think it boils down to this.

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The United States attorneys are the president's chief legal representatives in the 94 federal judicial districts. In my former district of Eastern Virginia, Supreme Court Chief Justice John Marshall was the first United States attorney. Being the president's chief legal representative means you are the face of the Department of Justice in your district. Every police chief you support, every victim you comfort, every citizen you inspire or encourage, and yes, every criminal who is prosecuted in your name communicates to all of these people something significant about the priorities and values of both the president and the Attorney General.

At his inauguration, the president raises his right hand and solemnly swears to faithfully execute the office of the president of the United States. He fulfills this promise in no small measure through the men and women he appoints as United States attorneys. If the president and the attorney general want to crack down on gun crimes -- if they want to go after child pornographers and pedophiles as this president and attorney general have ordered federal prosecutors to do, it's the United States attorneys who have the privilege of making such priorities a reality. That's why it's the best job a lawyer can ever have. It's an incredible honor.

And this is why, Mr. Chairman, judges should not appoint United States attorneys as S. 214 proposes. What could be clearer executive branch responsibilities than the attorney general's authority to temporarily appoint, and the president's opportunity to nominate for Senate confirmation, those who will execute the president's duties of office? S. 214 doesn't even allow the attorney general to make any interim appointments, contrary to the law prior to the most recent amendment.

The indisputable fact is that United States attorneys serve at the pleasure of the president. They come and they go for lots of reasons. Of the United States attorneys in my class at the beginning of this administration, more than half are now gone. Turnover is not unusual, and it rarely causes a problem because even though the job of United States attorney is extremely important, the greatest assets of any successful United States attorney are the career men and women who serve as assistant United States attorneys. Victim witness coordinators, paralegals, legal assistants, and administrative personnel -- their experience and professionalism ensures smooth continuity as the job of U.S. attorney transitions from one person to another.

Mr. Chairman, I conclude with these three promises to this committee and the American people on behalf of the attorney general and myself. First, we have -- we never have and never will seek to remove a United States attorney to interfere with an ongoing investigation or prosecution or in retaliation for prosecution. Such an act is contrary to the most basic values of our system of justice, the proud legacy of the Department of Justice and our integrity as public servants.

Second, in every single case where a United States attorney position is vacant, the administration is committed to fulfilling -- to filling that position with a United States attorney who is confirmed by the Senate. The attorney general's appointment authority has not and will not be used to circumvent the confirmation process. All accusations in this regard are contrary to the clear factual record. The statistics are laid out in my written statement. And third, through temporary appointments and nominations for Senate confirmation, the administration will continue to fill U.S. attorney vacancies with men and women who are well qualified to assume the important duties of this office. Mr. Chairman, if I thought the concerns you outlined in

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your opening statement were true, I would be disturbed too. But these concerns are not based on facts. And the selection process we will discuss today I think will shed a great deal of light on that.

Finally, I have a lot of respect for you, Mr. Chairman, as you know. And when I hear you talk about the politicizing of the Department of Justice, it's like a knife in my heart. The AG and I love the department, and it's an honor to serve, and we love its mission. And your perspective is completely contrary to my daily experience, and I would love the opportunity -- not just today but in the weeks and months ahead -- to dispel you of the opinion that you hold.

I appreciate your friendship and courtesy, and I am happy to respond to the committee's questions.

SEN. SCHUMER: Well, thank you, Deputy Attorney General, and very much appreciate your heartfelt comments.

I can just tell you -- and it's certainly not just me but speaking for myself -- what I have seen happen in the Justice Department is a knife to my heart as somebody who's followed and overseen the Justice Department for many, many years. And perhaps there are other explanations, but on issue after issue after issue after issue -- I think Senator Specter alluded to it to some extent -- the view that executive authority is paramount. To the extent that many of us feel congressional prerogatives written in law are either ignored or ways are found around them, I have never seen anything like it. And there are many fine public servants in the Justice Department. I had great respect for your predecessor, Mr. Comey. I have great respect for you. But you have to judge the performance of the Justice Department by what it does, not the quality or how much you like the people in it. And so my comment is not directed at you in particular, but it is directed at a Justice Department that seems to me to be far more politically harnessed than previous Justice Departments, whether they be under Democrat or -- Democratic or Republican administrations.

There are a lot of questions, but I know some of my colleagues -- I know my colleague from Rhode Island wants to ask questions and has other places to go so I'm going to limit the first round to five minutes for each of us, and then we'll -- in the second round we'll go to more unlimited time if it's just reasonable, if that's okay with you, Mr. Chairman, okay?

First, I just -- you say in your testimony that a United States attorney may be removed for any reason or no reason, that's your quote. So my first question is do you believe that U.S. attorneys can be fired on simply a whim? Somehow the president (sneeze) or the attorney general -- bless you -- wakes up one morning and says, "I don't like him -- let's fire him." What's the reason? "I just don't like him." Would that be okay?

MR. MCNULTY: Well, Mr. --

SEN. SCHUMER: Well, let me say, is that legally allowed?

MR. MCNULTY: Well, if we're using just a very narrow question of can in a legal sense, I think the law is clear that "serve at the pleasure" would mean that there needs to be no specific basis.

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SEN. SCHUMER: Right. But I think you would agree that that would not be a good idea.

MR. MCNULTY: I would agree.

SEN. SCHUMER: Okay. Now let me ask you this. You do agree that a United States attorney can't be removed for a discriminatory reason -- because that person is a woman or black or -- do you agree with that?

MR. MCNULTY: Sure. I --

SEN. SCHUMER: So there are some limits here?

MR. MCNULTY: Well, of course, and there would certainly be moral limits and -- I don't know the law in the area of removal and relates to those special categories, but I certainly know that as a -- an appropriate thing to do -- would be completely inappropriate.

SEN. SCHUMER: Okay. And you do believe, of course, that a U.S. attorney could be removed for a corrupt reason --

MR. MCNULTY: Right.

SEN. SCHUMER: -- in return for a bribe or a favor? Okay. Now let me ask you this. Do you think it is good for public confidence and respect of the Justice Department for the president to exercise his power to remove a U.S. attorney simply to give somebody else a chance at the job? Let's just assume for the sake of argument that that's the reason. Mr. X, you're doing a very, very fine job but we'd prefer -- and you're in the middle of your term -- no one objects to what you've done -- but we prefer that Mr. Y take over. Would that be a good idea? Would that practice be wise?

MR. MCNULTY: I think that if it was done on a large scale, it could raise substantial issues and concerns. But I don't have the same perhaps alarm that you might have about whether or not that is a bad practice. If at the end of the first four-year term -- and of course all of our confirmation certificates say that we serve for a four-year term -- at the end of that four-year term, if there was an effort to identify and nominate new individuals to step in -- to take on a second term, for example, I'm not so sure that would be contrary to the best interest of the Department of Justice. It's not something that's been done -- it's not something that's being contemplated to do. But the turnover has already been essentially like that. We've already switched out more than half of the U.S. attorneys that served in the first term, so change is not something that slows down or debilitates the work of the Department of Justice.

SEN. SCHUMER: Right. But -- and all of these, these seven that we are talking about, they had completed their four-year terms, every one of them, but then had been in some length of holdover period.

MR. MCNULTY: Right.

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SEN. SCHUMER: They weren't all told immediately at the end, or right before the end of their four-year term, to leave. Is that right?

MR. MCNULTY: That's correct.

SEN. SCHUMER: Okay. I still have a few minutes left, but I now have a whole new round of questioning and I don't want to break it in the middle, so I'm going to call on Senator Specter for his five minutes.

SEN. SPECTER: (Audio break) -- Chairman.

Mr. McNulty, were you ever an assistant U.S. attorney?

MR. MCNULTY: No, I wasn't.

SEN. SPECTER: Well, I was interested in your comment that the best job you had was U.S. attorney, and that's probably because you were never an assistant U.S. attorney -- (laughter) -- because I was an assistant district attorney, and that's a much better job than district attorney.

MR. MCNULTY: I've heard that from a lot of assistants. That's true.

SEN. SPECTER: The assistants just get to go into court and try cases and cross-examine witnesses and talk to juries and have a much higher level of sport than administrators who are U.S. attorneys or district attorneys.

Mr. McNulty, what about Carol Lam? I think we ought to get specific with the accusations that are made. Why was she terminated?

MR. MCNULTY: Senator, I came here today to be as forthcoming as I possibly can, and I will continue to work with the committee to provide information. But one thing that I do not want to do is, in a public setting, as the attorney general declined to do, to discuss specific issues regarding people. I think that it's -- it is unfair to individuals to have a discussion like that in this setting, in a public way, and I just have to respectfully decline going into specific reasons about any individual.

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SEN. SPECTER: Well, Mr. McNulty, I can understand your reluctance to do so, but when we have confirmation hearings, which is the converse of inquiries into termination, we go into very difficult matters. Now, maybe somebody who's up for confirmation has more of an expectation of having critical comments made than someone who is terminated, and I'm not going to press you as to a public matter. But I think the committee needs to know why she was terminated, and if we can both find that out and have sufficient public assurance that the termination was justified, I'm delighted -- I'm willing to do it that way.

I'm not sure that these attorneys who were terminated wouldn't prefer to have it in a public setting, but we have the same thing as to Mr. Cummins and we have the same thing as to going into the qualifications of the people you've appointed. But to find out whether or not what Senator Schumer has had to say is right or wrong, we need to be specific.

MR. MCNULTY: Can I make two comments on -- first on the question of confirmation process. If you want to talk about me, and I'm here to have an opportunity to respond to everything I've ever done, that's one thing. I just am reluctant to talk about somebody who's not here and has the right to respond. And I don't -- I just don't want to unfairly prejudice any --

SEN. SPECTER: But Mr. McNulty, we are talking about you when we ask the question about why did you fire X or why did you fire Y. We're talking about what you did.

MR. MCNULTY: And I will have to be -- try to work with the committee to give them as much information as possible, but I also want to say something else.

Essentially, we're here to stipulate to the fact that if the committee is seeking information, our position basically is that -- that there is going to be a range of reasons and we don't believe that we have an obligation to set forth a certain standard or reason or a cause when it comes to removal.

SEN. SPECTER: Are you saying that aside from not wanting to have comments about these individuals in a public setting which, again, I say I'm not pressing, that the Department of Justice is taking the position that you will not tell the committee in our oversight capacity why you terminated these people?

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MR. MCNULTY: No. No, I'm not saying that. I'm saying something a little more complicated than that. What I'm saying is that in searching through any document you might seek from the Department, such as an -- every three years we do an evaluation of an office. Those are called "EARS" reports. You may or may not see an EAR report what would be of concern to the leadership of a department, because that's just one way of measuring someone's performance. And much of this is subjective, and won't be apparent in the form of some report that was done two or three years ago by a group of individuals that looked at an office.

SEN. SPECTER: Well, my time is up, but we're going to go beyond reports. We're going to go to what the reasons were.

MR. MCNULTY: Sure.

SEN. SPECTER: -- subjective reasons are understandable.

MR. MCNULTY: I understand -- (cross talk) --

SEN. SPECTER: I like -- I like to observe that red signal, but you don't have to. You're the witness. Go ahead.

MR. MCNULTY: No, I just -- the senator opened, the chairman opened with a reference to documentation, and I just wanted to make it clear that there really may or may not be documentation as you think of it, because there aren't objective standards necessary in these matters when it comes to managing the department and thinking through what is best for the future of the department in terms of leadership of offices. In some places we may have some information that you can read; in others, we'll have to just explain our thinking.

SEN. SPECTER: Well, we can understand oral testimony and subjective evaluations.

MR. MCNULTY: Thank you, Senator.

SEN. SPECTER: We don't function solely on documents.

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SEN. SCHUMER: Especially those of us who've been assistant district attorneys.

SEN. SPECTER: That's the standard, Mr. McNulty. So your qualifications are being challenged here. You haven't been an assistant U.S. attorney. (Laughter.)

SEN. SCHUMER: The senator from Rhode Island.

SEN. SHELDON WHITEHOUSE (D-RI): Thank you, Mr. Chairman.

Mr. McNulty, welcome. You're clearly a very wonderful and impressive man. But it strikes me that your suggestion that there is a clear factual record about what happened and that this was just turnover are both just plain wrong.

I start on the clear factual record part with the suggestion that has been made to The Washington Post, that the attorney general also made to us, and I'm quoting from the Post article on Sunday: "Each of the recently dismissed prosecutors had performance problems," which does not jibe with the statement of Mr. Cummins from Arkansas that he was told there was nothing wrong with his performance, but that officials in Washington wanted to give the job to another GOP loyalist. So right from the very get-go we start with something that is clearly not a clear factual record of what took place; in fact, there's -- on the very basic question of what the motivation was for these, we're getting two very distinct and irreconcilable stories.

MR. MCNULTY: Senator --

SEN. WHITEHOUSE: And I don't think that, if it's true, that as The Washington Post reported, six of the prosecutors received calls notifying them of their firings on a single day. The suggestion that this is just ordinary turnover doesn't seem to pass the last test, really. Could you respond to those two observations?

MR. MCNULTY: Yes, sir. Thank you.

Senator, first of all, with regard to Arkansas and what happened there and any other efforts to seek the resignation of U.S. attorneys, these have been lumped together, but they really ought not to be. And we'll talk about the Arkansas situation, as Senator Pryor has laid it out.

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And the fact is that there was a change made there that was not connected to, as was said, the performance of the incumbent, but more related to the opportunity to provide a fresh start with a new person in that position.

With regard to the other positions, however --

SEN. WHITEHOUSE: But why would you need a fresh start if the first person was doing a perfectly good job?

MR. MCNULTY: Well, again, in the discretion of the department, individuals in the position of U.S. attorneys serve at the pleasure of the president. And because turnover -- and that's the only way of going to your second question I was referring to turnover -- because turnover is a common thing in U.S. attorneys offices --

SEN. WHITEHOUSE: I know. I turned over myself as a U.S. attorney.

MR. MCNULTY: -- bringing in someone does not create a disruption that is going to be hazardous to the office. And it does, again, provide some benefits.

In the case of Arkansas, which this is really what we're talking about, the individual who was brought in had a significant prosecution experience -- he actually had more experience than Mr. Cummins did when he started the job -- and so there was every reason to believe that he could be a good interim until his nomination or someone else's nomination for that position went forward and there was a confirmed person in the job.

SEN. WHITEHOUSE: Mr. McNulty, what value does it bring to the U.S. attorneys office in Arkansas to have the incoming U.S. attorney have served as an aide to Karl Rove and to have served on the Republican National Committee?

MR. MCNULTY: With all --

SEN. WHITEHOUSE: Do you find anything useful there to be an U.S. attorney?

MR. MCNULTY: Well, I don't know. All I know is that a lot of U.S. attorneys have political backgrounds. Mr. Cummins ran for Congress as a Republican candidate. Mr. Cummins served in the Bush- Cheney campaign. I don't know if those experiences were useful for him to be a successful U.S. attorney, because he was.

I think a lot of U.S. attorneys bring political experience to the job. It might help them in some intangible way. But in the case of Mr. Griffin, he actually was in that district for a period of time serving as an assistant United States attorney, started their gun enforcement program, did many cases as a JAG prosecutor, went to Iraq, served his country there and came back. So there are a lot of things about him that make him a credible and well-qualified person to be a U.S. attorney.

SEN. WHITEHOUSE: Having run public corruption cases, and having firsthand experience of how difficult it is to get people to be willing to testify and come forward, it is not an easy thing to do. You put your career,

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you put your relations, everything on the line to come in and be a witness. If somebody in Arkansas were a witness to Republican political corruption, do you think it would have any affect on their willingness to come forward to have the new U.S. attorney be somebody who assisted Karl Rove and worked for the Republican National Committee? Do you think it would give any reasonable hesitation or cause for concern on their part that maybe they should keep this one to themselves until the air cleared?

MR. MCNULTY: Well, again, U.S. attorneys over a period of long history have had political backgrounds, and yet they've still been successful in doing public corruption cases. I think it says a lot about what U.S. attorneys do when they get into office.

One thing, Senator, as you know as well as I do, public corruption cases are handled by career agents and career assistant United States attorneys. U.S. attorneys play an important role, but there is a team that's involved in these cases. And that's a nice check on one person's opportunity to perhaps do something that might not be in the best interest of the case.

So my experience is that the political backgrounds of people create unpredictable situations. We've had plenty of Republicans prosecute Republicans in this administration, and we've had Democrats prosecute Democrats. Because once you put that hat on to be the chief prosecutor in the district, it transforms the way you look at the world. It certainly --

SEN. WHITEHOUSE: We hope.

MR. MCNULTY: -- yes.

SEN. SCHUMER: Senator --

SEN. WHITEHOUSE: Mr. Chairman, is it clear that we will be receiving the EARS evaluations for these individuals?

SEN. SCHUMER: We will get them one way or another, yes. SEN. WHITEHOUSE: Thank you.

SEN. SCHUMER: Senator Hatch.

SEN. HATCH: Well, first of all, Mr. McNulty, thanks for your testimony. I also concur with the chairman that you're a great guy and you've served this country very, very well in a variety of positions --

MR. MCNULTY: Thank you, Senator.

SEN. HATCH: -- and we all have great respect for you, having served up here in the Congress.

Are these really called "firings" down at the Department of Justice?

MR. MCNULTY: No.

SEN. HATCH: Were the people removed?

MR. MCNULTY: The terminology that's been assigned to these -- firings, purges and so forth -- it's, I think, unfair.

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Certainly the effort was made to encourage and --

SEN. HATCH: Well, basically, my point is, they're not being fired. You're replacing them with other people who may have the opportunity as well.

MR. MCNULTY: Correct. And Senator, one other thing I wanted to say to Senator Whitehouse --

SEN. HATCH: And that's been done by both -- by Democrats and Republican administrations, right?

MR. MCNULTY: Absolutely.

SEN. HATCH: Is this the only administration that has replaced close to 50 percent of the U.S. attorneys in its six years in office?

MR. MCNULTY: I haven't done an analysis of the --

SEN. HATCH: But others have as well, haven't they?

MR. MCNULTY: Well, it's a routine thing to see U.S. attorneys come and go, as I said. And --

SEN. HATCH: Well, I pointed out at the beginning of this that President Clinton came in and requested the resignation of all 93 U.S. attorneys. Are you aware of that? MR. MCNULTY: Yes, I am. I was, in fact --

SEN. HATCH: I didn't find any fault with that. That was his right.

MR. MCNULTY: Right.

SEN. HATCH: Because they serve at the pleasure of the president, right?

MR. MCNULTY: Right.

SEN. HATCH: Well, does the president always -- or does the department always have to have a reason for replacing a U.S. attorney?

MR. MCNULTY: They don't have to have cause. I think in responding to Senator Schumer's question earlier --

SEN. HATCH: They don't even have to have a reason. If they want to replace them, they have a right to do so. Is that right or is that wrong?

MR. MCNULTY: They do not have to have one, no.

SEN. HATCH: Well, that's my point. In other words, to try and imply that there's something wrong here because certain U.S. attorneys have been replaced is wrong, unless you can show that there's been some real impropriety. If there's real impropriety, I'd be the first to want to correct it.

Let me just ask you this: the primary reason given for last year's amendment of 28 USC 546 was the recurring -- happened to be from the recurring problems that resulted from the 120-day limitation on attorney general appointments. Now, can you explain some of these programs and address the

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concerns of the district courts that recognize the conflict in appointing an interim U.S. attorney?

MR. MCNULTY: Senator, just prior to that change being made -- as Senator Specter set forth in his opening statement -- we had a serious situation arise in South Dakota. And that situation illustrates what can happen when you have two authorities seeking to appoint a U.S. attorney. In that case in South Dakota, the Public Defenders Officer actually challenged an indictment brought by the interim U.S. attorney, claiming that he didn't have the authority to indict someone because the judge there had appointed someone else to be the U.S. attorney at about the same time.

The individual that the judge appointed was somebody outside the Department of Justice, hadn't gone through a background check. We couldn't even communicate with that individual on classified information until a background check would have been done. And so it was a rather serious problem that we faced and lasted for a month or more. There have been other problems like that over the history of the department where someone comes in, perhaps, and has access to public corruption information who's completely outside of the Department of Justice --

SEN. HATCH: Would you be willing to make a list of these types of problems?

MR. MCNULTY: Well, we've been asked to do that in the questions that were submitted for the record --

SEN. HATCH: Okay. I figured that. So if you'll get that list to us so that we understand that these are not simple matters. And that, you know, in your testimony you mentioned with great emphasis that the administration has at no time sought to avoid the Senate confirmation process by appointing an interim United States attorney, and then refuse to move forward in consultation with home-state senators on the selection, nomination and confirmation of a new United States attorney.

Can you explain the role of the home-state senator in this process, and confirm that it has been done for the vacancies that have arisen since this law was amended?

MR. MCNULTY: Thank you, Senator.

We've had 15 nominations made since the law was amended. All 15 of those nominations could have been held back if we wanted to abuse this authority and just go ahead and put interims in. We've had 13 vacancies. All told, there have been about 23 situations where a nomination is necessary to go forward. Fifteen nominations have gone forward, and the eight where they haven't, we're currently in the process of consulting with the home-state senators to send someone here.

And one thing, Senator, I have to say -- because Senator Whitehouse referred to it -- in the case of individuals who were called and asked to resign, not one situation have we had an interim yet appointed who is -- falls into some category of a Washington person or an insider or something. The -- in the cases where an interim has been appointed in those most recent situations, they've both been career persons from the office who are the interims, and we are working with the home-state senators to identify the nominee who will be sent to this committee for confirmation.

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SEN. HATCH: Thank you, Mr. Chairman.

SEN. SCHUMER: Senator Feinstein.

SEN. DIANNE FEINSTEIN (D-CA): Thank you very much, Mr. Chairman, and thank you for holding these hearings.

Mr. McNulty, I believe it was in the 2006 reauthorization of the Patriot Act when this amendment was slipped into the law, too. And it was slipped into the law in a way that I do not believe anyone on this committee knew that it was in the law. At least to my knowledge, no one has come forward and said, "Yes, we discussed this. I knew it was in the law." No Republican, no Democrat. I'd like to ask this question. Did you or any Justice staff make a series of phone calls in December to at least six United States attorneys telling them they were to resign in January?

MR. MCNULTY: -I think I can say yes to that because I don't want to be -- talk about specific numbers. But phone calls were made in December asking U.S. attorneys to resign. That's correct.

SEN. FEINSTEIN: And how many U.S. attorneys were asked to resign?

MR. MCNULTY: Because of the privacy of individuals, I'll say less than 10.

SEN. FEINSTEIN: Okay, less than 10. And who were they?

MR. MCNULTY: Senator, I would, following the Attorney General's response to this question at his committee, in a public setting, I don't want to mention the names of individuals -- not all names have necessarily been stated, or if they have, they've not been confirmed by the department of Justice. And information like that can be provided to the committee in a private setting. But in the public setting, I wish to not mention specific names.

SEN. FEINSTEIN: And in a private session, you would be willing to give us the names of the people that were called in December?

MR. MCNULTY: Yes.

SEN. FEINSTEIN: Thank you very much.

Mr. Chairman, I think just by way of -- my own view is that the Patriot Act should not have been amended to change, and I know Senator Specter felt -- I know Senator Specter feels that we should simply return the language to the way it was prior to the reauthorization in 2006. And I am agreeable to this. So I think we have found a solution that, in essence, would give the United States attorney an opportunity to make a truly temporary appointment for a limited period of time, after which point if there -- no nominee has come up for confirmation or been confirmed, it would go to a judge. And I believe that -- we'll mark that up tomorrow and hopefully that would settle the matter.

In my heart of hearts, Mr. McNulty, I do believe -- I could not prove in a court of law -- but I do believe, based on what I was -- heard, is there was an effort made to essentially put in interim U.S. attorneys to give, as one person has said, bright young people of our party to put them in a position where they might be able to shine. That, in itself, I don't have an objection

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to; I think you're entitled to do that. But I think to use the U.S. attorney spot for this is not the right things to do, and that's why I think we need to put the law back the way it is.

Let me just ask just one --

MR. MCNULTY: Senator, may I respond real briefly?

SEN. FEINSTEIN: Sure, sure.

MR. MCNULTY: And I respect your position on that. But I don't want it -- to just want to make it clear that that premise has to be looked at in light of the process we go through to select the new U.S. attorneys because if that were the case, that we were doing this just to give a sort of a group that had been pre-identified or something an opportunity to serve, it would not square with the process that exists in virtually every state in one way or another to work with the home-state senators to come up with the list of names of individuals.

In California, for example -- you know well because you've led the way -- in which the system we've set up to identify qualified people, and that's been a bipartisan process. It's worked very well. It's -- we respect that process. We will follow that process for vacancies that occur in California. So there won't be any way -- any effort to try to force certain individuals into these positions since we go through a pre-established nomination, identification and then confirmation process.

SEN. FEINSTEIN: I appreciate that.

Could I ask a question? There -- one last question? There are currently 13 vacancies, and this number does not include the recent additional seven vacancies like the ones in my state that have developed. Now there are only two nominees pending before the United States Senate at this time. When do you intend to have the other nominees sent to us?

MR. MCNULTY: I think we're higher than two out of the current vacancies that you know of. Well --

SEN. FEINSTEIN: No.

MR. MCNULTY: Okay, I will -- I'll defer to your numbers on it.

MR. : (Off mike.)

What's that? (Off mike.) Two is right, sorry. We will make every effort possible to identify nominees to submit for your consideration here in the committee. Sometimes the process takes a little longer because there is something going on in this home state for a selection process. We move quickly when we receive names to have interviews. So we don't -- the process doesn't get delayed there. But it is a complicated process to develop a final list in consultation and get them up here. But we're committed to doing that as quickly as possible for every vacancy we have.

SEN. SCHUMER: Thank you.

Senator Specter wanted to say a brief word before Senator Feinstein left, and then we'll go to Senator Sessions.

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SEN. SPECTER: Well, I just wanted to comment to Senator Feinstein that I thank her for her work on this issue. I had said before you arrived in my opening statement that I did not know of the change in the Patriot Act until you called it to my attention on the floor. And I said to you at that time, "This is news to me, but I'll check it out." And then checked it out with Mike O'Neill (sp), who advised that Brett Tolman (ph), a senior staff member, had gotten the request from the department of Justice because of a situation in South Dakota where a judge made an appointment which was not in accordance with the statute. And there -- got an issue arising with other courts questioning the separation of powers. But when you and I have discussed it further and -- continuously, including yesterday, we came to the conclusion that we would send it back to the former statute, which I think will accommodate the purpose of this.

SEN. FEINSTEIN: Thank you very much. Thank you. SEN. SCHUMER: Senator Sessions.

SEN. JEFF SESSIONS (R-AL): Thank you.

And Senator Feinstein, I am troubled by the mushiness of our separation of powers and the constitutional concepts of executive branch and confirmation in your proposal. I think it goes too far. I think the administration's -- the proposal that passed last time may need some reform. I would be inclined to suggest, Mr. Chairman, that the reform needed may be to some sort of expedited or ensured confirmation -- submission and confirmation by the Senate rather than having the executive branch, which constitutionally has not been ever considered a part of this process, to be appointing U.S. attorneys. But whatever.

You know, I don't know how I got to be United States attorney. I see Senator Whitehouse. Maybe they thought he would be a bright young star one day if they appointed him United States attorney. I recall Rudy Giuliani -- there was a dispute over his successor when he was United States attorney in Manhattan, and he said he thought it would be nice if he ever were appointed -- was able to contribute to the discussion every now and then. We do have U.S. attorneys to preside over a lot of important discussions, and they generally put their name on the indictments of important cases -- at least they're responsible whether they sign the indictment or not -- so it's a very significant position, and it's difficult sometimes to anticipate who would be good at it and who would not. Some people without much experience do pretty well. Some with experience don't do very well at all.

We had a situation in Alabama that wasn't going very well, and Department of Justice recently made a change in the office and was reported as being for performance reasons. You filled the interim appointment with now Assistant United -- U.S. Attorney Debra Rhodes, a professional from San Diego -- professional prosecutor who'd been in the Department of Justice. She was sent in to bring the office together -- did a good job of it. Senator Shelby and I recommended she be made -- be a permanent United States attorney and we did that.

My personal view is that the Department of Justice is far too reticent in removing United States attorneys that do not perform. United States attorneys

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are part of the executive branch. They have very important responsibilities. I recall seeing an article recently about wonderful Secretary of Labor Elaine Chao -- she's the last member of the Cabinet standing was part of the article. I mean, Cabinet members turn over. They're appointed and confirmed by the Senate at the pleasure of the president, and I think the Department of Justice has a responsibility of your 92 United States attorneys to see that they perform to high standards, and if they do not so perform, to move them.

I don't see anything wrong with taking -- giving an opportunity to somebody who's got a lot of drive and energy and ability, and letting them be a United States attorney and seeing how they perform. But they ought to have certain basic skills in my view that indicate they're going to be successful at it, and otherwise you as the president gets judged on ineffectual appointments and failing to be effective in law enforcement and related issues. I just wanted to say that.

Seven out of 92 to be asked to step down is not that big a deal to me. I knew when I took the job that I was subject to being removed at any time without cause, just like a secretary of State who doesn't have the confidence of the president, or the secretary of Transportation. If somebody had called and said, "Jeff, we'd like you gone," you say, "Yes, sir," and move on I think than be whining about it. You took the job with full knowledge of what it's all about.

With regard to one of -- I know you don't want to comment about these individual United States attorneys and what complaints or performance problems or personal problems or morale problems within the office may have existed. I would just note that one has been fairly public, and Carol Lamb has been subject to quite a number of complaints. Have you received complaints from members of Congress about the performance of United States Attorney Carol Lamb in San Diego on the California border?

MR. MCNULTY: Well, we've received letters from members of Congress. I don't want to go into the substance of them although the members can speak for them. But I -- again, I want to be very careful about what I say concerning any particular person.

SEN. SESSIONS: Well, on July 30th, 14 House members expressed concerns with the Department of Justice current policy of not prosecuting alien smugglers -- I don't mean people that come across the border -- I mean those who smuggle groups of them across the border -- specifically mentioning that Lamb's office to -- had declined to prosecute one key smuggler. Are you familiar with that -- June 30th, 2004?

MR. MCNULTY: I'm familiar with the letter.

SEN. SESSIONS: On September 30th -- 23rd, 2004, 19 House members described the need for the prosecution of illegal alien smugglers -- these are coyotes -- in the border U.S. Attorney offices, and they specifically mentioned the United States attorney in San Diego. Quote -- this is what they said -- quote, "Illustrating the problem, the United States Attorney's office in San

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Diego stated that it is forced to limit prosecution to only the worst coyote offenders, leaving countless bad actors to go free," closed quote. Isn't that a letter you received that said that?

MR. MCNULTY: I'm familiar with the letter.

SEN. SESSIONS: On October 13th of 2005, Congressman Darryl Issa wrote to U.S. Attorney Lamb complaining about her, saying this: "Your office has established an appalling record of refusal to prosecute even the worst criminal alien offenders," closed quote. And then on October 20th, '05, 19 House members wrote, quote -- to the Attorney General Gonzalez, to express their frustration, saying, quote, "The U.S. attorney in San Diego has stated that the office will not prosecute a criminal alien unless they have previously been convicted of two felonies in the District -- two felonies in the District," closed quote, before they would even prosecute, and do you see a concern there? Is that something that the attorney general and the president has to consider when they decide who their U.S. attorneys are?

MR. MCNULTY: Well, anytime the members of Congress, senators, House members, write letters to us we take them seriously and would give them the consideration that's appropriate.

SEN. SCHUMER: Thank you, Mr. McNulty. We'll have a second round if you want to pursue with Senator Sessions. Okay. I'm going to go into my second round, and I want to go back to Bud Cummins. First, Bud Cummings has said that he was told he had done nothing wrong and he was simply being asked to resign to let someone else have the job. Does he have it right?

MR. MCNULTY: I accept that as being accurate as best I know the facts.

SEN. SCHUMER: Okay. So in other words, Bud Cummins was fired for no reason. There was no cause --

MR. MCNULTY: No cause provided in his case as I'm aware of.

SEN. SCHUMER: None at all. And was there anything materially negative in his evaluations? In his EARS reports or anything like that? From the reports that everyone has received, he had done an outstanding job -- had gotten good evaluations. Do you believe that to be true?

MR. MCNULTY: I don't know of anything that's negative, and I haven't seen his reports or one that -- probably only one that was done during his tenure but I haven't seen it. But I'm not aware of anything that --

SEN. SCHUMER: Would you be willing to submit those reports to us even if we wouldn't make them public?

MR. MCNULTY: Right. Well, other than -- I just want to fall short of making a firm promise right now, but we know that you're interested in them and we want to work with you to see how we can accommodate your needs.

SEN. SCHUMER: So your inclination is to do it but you don't want to give a commitment right here?

MR. MCNULTY: Correct.

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SEN. SCHUMER: Okay. I will -- as I said in my opening statement, if we can't get them I will certainly discuss with the chairman my view that we should subpoena them if we can't get them. This is serious matter. I don't think they should be subpoenaed. I think we should get them -- certainly a report like this which is a positive evaluation. Your reasoning there, at least as far as Cummings is concerned -- obviously you can make imputations if others are not released -- wouldn't hurt his reputation in any way.

MR. MCNULTY: I'd just say, Mr. Chairman, if you get a report, see a report, and it doesn't show something that you believe is cause, to me that's not an a-ha moment, because as I say right up front, those reports are written by peers --

SEN. SCHUMER: Understood. MR. MCNULTY: -- and they may or may not contain (cross talk) --

SEN. SCHUMER: But you did say earlier -- and this is the first we've heard of this -- that he was not fired for a particular reason -- that when he said he was being fired simply to let someone else have a shot at the job, that's accurate as best you can tell.

MR. MCNULTY: I'm not disputing that characterization.

SEN. SCHUMER: Okay. That's important to know. Now -- so then we go on to the replacement for Mr. Cummins. And again, as Senator Feinstein and others have said, there are all kinds of reasons people are chosen to be U.S. attorneys. But I first want to ask about this. Senator Pryor talked about allegations -- I think they were in the press he mentioned -- about his successor, Mr. Griffin, quote, "Being involved in caging black votes," unquote.

First, if there were such an involvement, if he did do that at some point in his job -- in one of his previous jobs -- do you think that could be -- that should be a disqualifier for him being U.S. attorney in a state like Arkansas, where there are obviously civil rights suits?

MR. MCNULTY: I think any allegation or issue that's raised against somebody has to be carefully examined, and it goes into the thinking as to whether or not that person is the best candidate for the job.

SEN. SCHUMER: Was Mr. Griffin given a thorough, thorough review before he was asked to do this job? And are you aware of anything that said he was involved in, quote, "caging black votes"?

MR. MCNULTY: First of all, in terms of the kind of review, there are different levels of review, depending upon what a person's going to be doing. If you're an interim, you're already, by definition, in the Department of Justice in one way or another, either in the office or in the criminal division or some other place. You already have a background check; you're already serving the American people at the Department of Justice. And so you may -- at that point, that has been sufficient, historically, to serve as an interim.

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Then there's a background check for purposes of nomination. That brings in more information.

SEN. SCHUMER: Yup.

MR. MCNULTY: We look at the background check carefully and decide, based upon that, whether or not it's appropriate to recommend to the president to nominate somebody.

SEN. SCHUMER: So I have two questions. Would such a background check have come up with the fact that he was involved in, quote, "caging black votes," if that were the fact?

MR. MCNULTY: Presumably -- I'm not an expert on how the background check process works entirely, but I think they go out and look at press clippings and other things. They might -- they go interview people. Maybe something comes up that relates to a person's activities; I'm pretty sure things come up relating to a person's activities apart from what they've done in the office.

SEN. SCHUMER: But let me get -- if he was involved in such -- such an activity, would it be your view, would you recommend to the attorney general that Mr. Griffin not become the U.S. attorney for Arkansas, if he were involved? And that's a big assumption, I admit. It's just something that Senator Pryor mentioned -- I think that was mentioned in a newspaper article.

MR. MCNULTY: And I don't want to sound like I'm quibbling. It's just that all I know here is that we have an article. Even Senator Pryor said that the explanation given was very different from what the article was.

SEN. SCHUMER: Mm-hm.

MR. MCNULTY: I don't know anything about it personally --

SEN. SCHUMER: Right.

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MR. MCNULTY: -- and so I'm -- I don't want to say that if I knew some article was true that that would. I'd have to know more about what that -

SEN. SCHUMER: I didn't ask about the article, if he was doing something that would prevent black people from voting --

MR. MCNULTY: Oh, of course. Well, if that's what it comes down to after all the facts are in --

SEN. SCHUMER: Even if that was a legal political activity?

MR. MCNULTY: That sounds like a very significant problem.

SEN. SCHUMER: Okay. All right. Now, second, I just want to get to this one, too, in Senator Pryor's testimony. Again, there were allegations that the first assistant was passed over because of maternity leave. I believe she said that?

MR. MCNULTY: (No audible response.)

SEN. SCHUMER: Okay. Do you dispute that?

MR. MCNULTY: No, it's just that in my briefings on what occurred, there is definitely some factual difference as to whether or not that really was a factor or not. It shouldn't be a factor and, therefore, I've been told --

SEN. SCHUMER: What if it was? What if it was a factor?

MR. MCNULTY: I'm sorry?

SEN. SCHUMER: What if it was a factor? I mean, she said it. She's a person of a degree of integrity. She was the first assistant in an important office --

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MR. MCNULTY: Right, but -- SEN. SCHUMER: -- and she's saying she was told she was passed over because of maternity leave. I'd have to check with my legal eagles, but that might actually be prohibited under federal law.

MR. MCNULTY: I don't know, but --

SEN. SCHUMER: I think that's probably true.

MR. MCNULTY: It should not be a factor in consideration of whether or not she would serve as the interim. And so I don't -- but I don't know if that is accurate.

SEN. SCHUMER: Can you, again, if you choose to -- I don't see any reason to do this in private, because this doesn't -- the reason you gave of not wanting to mention the EARS reports or others is you don't want to do any harm to the people who were removed. But would you be willing to come back to us and give us an evaluation as to whether that remark was, that that comment was true and whether she was fired because of -- passed over because of maternity leave? Could you come back to the committee and report to that?

MR. MCNULTY: Yes, I mean -- at this point I can say, to the best of my knowledge, that is not the case. In fact, Mr. Griffin was identified as the person who would become the interim and possibly become the nominee before the knowledge of her circumstances was even known.

SEN. SCHUMER: Okay. Again, I would ask that you come back and give us a report in writing as to why what she is saying is not true or is a misinterpretation, okay?

MR. MCNULTY: Okay.

SEN. SCHUMER: All right, now let me ask you this. You admitted, and I'm glad you did, that Bud Cummins was fired for no reason. Were any of the other six U.S. attorneys who were asked to step down fired for no reason as well?

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MR. MCNULTY: As the attorney general said at the - his oversight hearing last month, the phone calls that were made back in December were performance-related.

SEN. SCHUMER: Mm-hm. All the others?

MR. MCNULTY: Yes.

SEN. SCHUMER: But Bud Cummins was not one of those calls, because he had been notified earlier.

MR. MCNULTY: Right. He was notified in June of -

SEN. SCHUMER: Okay, so there was a reason to remove all the other six? MR. MCNULTY: Correct.

SEN. SCHUMER: Okay. Let me ask you this. I want to go back to Bud Cummins here. So here we have the attorney general adamant; here's his quote, "We would never, ever make a change in the U.S. attorney position for political reasons." Then we have now -- for the first time, we learn that Bud Cummins was asked to leave for no reason and we're putting in someone who has all kinds of political connections -- not disqualifiers, obviously, certainly not legally -- and I'm sure it's been done by other administrations as well. But do you believe that firing a well-performing U.S. attorney to make way for a political operative is not a political reason?

MR. MCNULTY: Yes, I believe that's it's not a political reason.

SEN. SCHUMER: Okay, could you try to explain yourself there?

MR. MCNULTY: I'll do my best. I think that the fact that he had political activities in his background does not speak to the question of his qualifications for being the United States attorney in that district. I think an honest look at his resume shows that while it may not be the thickest when it comes to prosecution experience, it's not insignificant either. He had been assistant United States attorney in that district to set up their Project Safe Neighborhoods program --

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SEN. SCHUMER: For how long had he been there?

MR. MCNULTY: I think that was about a year or so.

SEN. SCHUMER: Yeah, I think it was less than that, a little less than that.

MR. MCNULTY: And he -- but he did a number of gun cases in that period of time. He's also done a lot of trials as a JAG attorney. He'd gone and served his country over in Iraq. He came back from Iraq and he was looking for a new opportunity. Again, he had qualifications that exceed what Mr. Cummins had when he started, what Ms. Casey had, who was the Clinton U.S. attorney in that district before she became U.S. attorney. So he started off with a strong enough resume, and the fact that he was given an opportunity to step in -- and there's one more piece of this that's a little tricky, because you don't want to get into this business of what did Mr. Cummins say here or there, because I think we should talk to him. But he may have already been thinking about leaving at some point anyway.

There are some press reports where he says that. Now, I don't know, and I don't want to put words in his mouth; I don't know what the facts are there completely. What I've been told, that there was some indication that he was thinking about this as a time for his leaving the office or in some window of time. And all those things came together to say in this case, this unique situation, we can make a change and this would still be good for the office.

SEN. SCHUMER: So you can say to me that you -- you put in your testimony you want somebody who's the best person possible.

MR. MCNULTY: Well, I didn't --

SEN. SCHUMER: Do you think Mr. Griffin is the best person possible? I can't even see how Mr. Griffin would be better qualified in any way than -- than Bud Cummins, who had done a good job, who was well respected, who had now had years of experience. There's somebody who served a limited number of months on a particular kind of case and had all kinds of other connections. It sure doesn't pass the smell test. I don't know what happened, and I can't -- you know, we'll try to get to the bottom of that. And I have more questions, but --

MR. MCNULTY: I didn't say "best person possible." If I used that as a standard, I would not become U.S. attorney.

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SEN. SCHUMER: You did.

MR. MCNULTY: I said "well qualified."

SEN. SCHUMER: Okay.

MR. MCNULTY: And that was -- those words were purposely chosen to say that he met the standards that are sufficient to take a job like that, and I have no hesitancy of that.

SEN. SCHUMER: I just want to -- I don't want to pick here with my friend Paul McNulty. Quote from your testimony, "For these reasons, the department is committed to having the best person possible discharging the responsibilities of that office at all times in every district."

I find it hard to believe that Tim Griffin was the best person possible. I find it hard to believe that anyone who did an independent evaluation in the Justice Department thought that Tim Griffin was a superior choice to Bud Cummins.

MR. MCNULTY: Well, I guess I was referring to my opening statement -- (cross talk) --

SEN. SCHUMER: Yeah, okay.

Let me ask you this: Can you give us some information how it came to be that Tim Griffin got his interim appointment? Who recommended him? Was it someone within the U.S. Attorneys Office in Arkansas? Was it someone from within the Justice Department?

MR. MCNULTY: Yeah. I don't know the answers to those questions.

SEN. SCHUMER: Could you get us answers to that in writing? And I'd also like to ask the question, did anyone from outside the Justice Department -- including Karl Rove -- recommend Mr. Griffin for the job? Again, I'm not saying there's anything illegal about that, but I think we ought to know.

MR. MCNULTY: Okay.

SEN. SCHUMER: Okay. But you don't have any knowledge of this right now?

MR. MCNULTY: I don't.

SEN. SCHUMER: Okay.

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Again, when Bud Cummins was told in the summer of 2006 that he was to leave, was the -- did those who told him have the idea of a replacement in mind?

MR. MCNULTY: I don't know for a fact, but I'm assuming that -- and being straightforward about this -- that the notion here was to install Mr. Griffin as an interim, give him an opportunity to go into that district, and then to work with the home-state senators on identifying the nominee who would be sent to the committee for the confirmation process. So if you want to assume that when Mr. Cummins was contacted there was already a notion that Mr. Griffin would be given an opportunity --

SEN. SCHUMER: You are assuming that.

MR. MCNULTY: -- is, I think, a fair assumption.

SEN. SCHUMER: All right.

Let me ask you this. Let's -- because we'll get some of these answers in writing about outside involvement and what specifically happened in the Bud Cummins case. It sure doesn't smell too good, and you know that and I know that, but maybe there's a more plausible explanation than the one that seems to be obvious to everybody.

But let's go onto these questions. Did the president specifically approve of these firings?

MR. MCNULTY: I'm not aware of the president being consulted. I don't know the answer to that question.

SEN. SCHUMER: Okay. Can we find out an answer to that?

MR. MCNULTY: We'll take it back.

SEN. SCHUMER: Yeah. Was the White House involved in anyway?

MR. MCNULTY: These are presidential appointments --

SEN. SCHUMER: Exactly.

MR. MCNULTY: -- so the White House personnel, I'm sure, was consulted prior to making the phone calls.

SEN. SCHUMER: Mm-hmm. Okay, but we don't know if the resident himself was involved, but the White House probably was.

When did the president become aware that certain U.S. attorneys might be asked to resign?

MR. MCNULTY: I don't know.

SEN. SCHUMER: Okay. Again, I would ask that you get back to us on that.

And fourth question, which I'm sure you cannot answer right now, was there any dissent over these firings? Do you know if there was any in the Justice Department -- did some people say, well, we shouldn't really do this?

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MR. MCNULTY: I'm not aware of that. To the contrary, actually, you know Dave Margolis. He's -- SEN. SCHUMER: I do.

MR. MCNULTY: -- been involved in all of the interviews for every interim who's been put in in this administration. He's been involved in every interview for every U.S. attorney that's been nominated in this administration. We have a set group of people and a set procedure that involves career people. Dave actually takes the lead role for us in that. And Dave was well aware of this situation.

And -- so apart from objections, I know of folks who believed that we had the authority and the responsibility to oversee the U.S. Attorneys Office the way we thought was appropriate.

SEN. SCHUMER: Right.

Okay, let me get to the EARS evaluations. Now, you agree that the EARS evaluations address a broad range of performance criteria that's pretty good. You said it's not the sole reason -- it's not the only criteria, but it's a pretty good basis to start with. Is that fair to say?

MR. MCNULTY: It can be in some instances. It just depends on what was going at that office at that time that those evaluators might have been able to spot.

SEN. SCHUMER: Okay.

Have you seen each -- for each of the seven fired U.S. attorneys, have you seen the EARS evaluations?

MR. MCNULTY: I have not seen all the evaluations involved in these cases, no.

SEN. SCHUMER: Okay. Well, you had said you'd be willing to talk over with us what was in those evaluations in private so you would protect the reputations of the U.S. attorneys. Can we do that this week?

MR. MCNULTY: Sure. We can try and make --

SEN. SCHUMER: Great. Thank you. I very much appreciate that.

And do you have any objection, in private, of providing these evaluations to the committee -- the EARS evaluations?

MR. MCNULTY: The only reason why I'm hesitating on that is because evaluations like that are what we would normally call deliberative material. And Senator Specter and I've discussed this -- you know, about the committee's oversight responsibilities. And I respect the committee's ability to get information, but often the committee shows comity to the department by appreciating the sensitivity of certain things. And we've appreciated your respect for that. And these evaluations are done by career U.S. attorney office staff who go into an office and look at it. It's deliberative. It provides information that could be prejudicial to some people. And so that's the only reason why I'm not sitting here saying, "Sure." I want to go back and want to think about what our policies --

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SEN. SCHUMER: I understand. But don't you agree it probably, given the sensitivities that you have, and given the questions we have, it seems to me logical we could work out something that would protect the reputations of those you wish to protect, and still answer our questions.

MR. MCNULTY: My goal is to give you as much information as we possibly can to satisfy your concerns that nothing was done wrong here.

SEN. SCHUMER: Good. Okay. And we will have our -- we will endeavor to have the meeting this week. And the legislation is moving, maybe we can clear the air on all of this or figure out what happened anyway, soon.

Let me just ask you this, in terms of more shoes that might drop: Is the job of Dan Dzwilewski -- now this is the special agent in San Diego. He defended Carol Lam. He called the firing political. He's the head FBI man over there. Is his job in any danger?

MR. MCNULTY: No.

SEN. SCHUMER: Good.

Next, are there any --

MR. MCNULTY: Certainly -- let me just put this -- not for reasons related that --

SEN. SCHUMER: As of today?

MR. MCNULTY: If the FBI has some other matter and I don't know --

SEN. SCHUMER: I understand.

MR. MCNULTY: Okay.

SEN. SCHUMER: We don't want him to have a carte blanche. We just don't want him to be fired for speaking his mind here, okay?

Are there anymore firings that might be expected? Any other U.S. attorneys who are going to be asked to resign in the very near future before the law that Senator Feinstein and Senator Specter are reinstating, I guess, is the right, takes effect? MR. MCNULTY: I am not aware of any other plans at this point to do that.

SEN. SCHUMER: Would you be willing to let the committee know if there were any plans -- or at least the home-state senators -- to know if there are any further plans in this regard, before those kinds of firings could occur?

MR. MCNULTY: That seems rather broad.

SEN. SCHUMER: Okay. Why don't you get back to us.

MR. MCNULTY: I just have to think about what you're asking there, okay? We want to consult with the home-state senators on filling those seats. I'm not sure if it's good policy for the executive branch to consult with the home-state senator before removing somebody from a position.

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SEN. SCHUMER: It really has not -- I don't know if it's happened in the past. At least it hasn't -- I mean, I've had good consultations with the Justice Department on the four U.S. attorneys in New York. By the way, none of them are going to be asked to resign in the next month or so, are they?

MR. MCNULTY: We have no -- no one is currently being contemplated right now.

SEN. SCHUMER: Okay. But it's something maybe you should consider, given everything that's happening here. And you know, if there's a legitimate reason that somebody should be removed, it might clear the air if the home-state senators, or someone outside of the executive branch, were consulted. And the most logical people are, given the tradition, are the home-state senators. So I'd ask you to consider that, but you don't have to give me an answer here.

MR. MCNULTY: (Cross talk.)

SEN. SCHUMER: Let me ask you about one further person.

There's a U.S. attorney in Texas -- Senator Cornyn has left, he might have more to say about this -- but Johnny Sutton has come under considerable fire for prosecuting two border agents who shot an alien smuggler. There have been public calls for his ouster by more than one Congressman. Is his performance in any danger?

MR. MCNULTY: No.

SEN. SCHUMER: Okay. I mean, is his position in any danger? Okay.

I'd now like to go on to Carol Lam. We talked a little bit about this. Senator Sessions mentioned all the Congresspeople who had written letters. I'd just ask Senator Sessions when -- was that -- were -- was that -- were those bipartisan letters? Do you know? I don't know who the 13 or 18 --

SEN. SESSIONS: (Off mike.)

SEN. SCHUMER: Okay. Well, if you could submit those letters to the record, we could answer that question.

SEN. SESSIONS: I would be glad to.

SEN. SCHUMER: Great. Without objection.

Now given the velocity -- the heat of the investigations that have gone on in southern California, did the Justice Department consider the chilling effect on those -- the potential chilling effect on those prosecutions when Carol Lamb was fired? I mean, wasn't it -- should it have been a factor as -- in --

MR. MCNULTY: Certainly.

SEN. SCHUMER: To be weighted? Do you know if that did?

MR. MCNULTY: Yes. It -- we are -- I have to be careful here because, again, I'm trying to avoid speaking on specifics. But we would be categorically opposed to removing anybody if we thought it was going to have either a negative effect in fact, or a reasonable appearance. Now we can be accused of anything.

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We can't always account for that. But as far as the -- a reasonable perception and the factual, that would be a very significant consideration. I mean, we wouldn't do it if we thought it would, in fact, interfere with a case.

SEN. SCHUMER: So you thought it would -- so there were discussions about this specific case, and people dismissed any --

MR. MCNULTY: Any time we ask for someone to resign --

SEN. SCHUMER: Chilling effect, or even as Senator Whitehouse mentioned, the break in the continuity of important ongoing prosecutions. Was that considered in this specific instance?

MR. MCNULTY: Any time we do this, we would consider that. And may I say one more thing about it? What happened in the prosecution of Congressman Cunningham was a very good thing for the American people, and for the department of Justice to accomplish. We are proud of that accomplishment, and any investigation that follows from that has to run its full course. Public corruption is a top priority for this department, and we would only want to encourage all public corruption investigations, and in no way want to discourage them. And our record, I think, speaks for itself on that.

SEN. SCHUMER: Were you involved in the dismissal -- in the decision to dismiss Carol Lamb?

MR. MCNULTY: I was involved in all of this, not just any one person. But I was consulted in the whole decision process.

SEN. SCHUMER: Okay. And did you satisfy yourself that -- I mean, it would be hard to satisfy yourself without an appearance problem --

MR. MCNULTY: Right.

SEN. SCHUMER: -- because there obviously was going to be an appearance problem. On the other hand, certain factors, at least in the Justice Department, must have outweighed that. It would be hard to believe that Carol Lamb was dismissed without cause in your mind. You must have had some cause.

MR. MCNULTY: All of the changes that we made were performance-related.

SEN. SCHUMER: Mm-hmm. Okay. And we'll discuss that privately towards the end of the week. So I'm not going to try to put you on the spot here.

But I do want to ask you this. Did anyone outside the Justice Department, aside from the letters we have seen that Senator Sessions mentioned, urge that Carol Lamb be dismissed?

MR. MCNULTY: I don't -- I don't know.

SEN. SCHUMER: Could you get an answer to that?

MR. MCNULTY: You mean anyone said -- because those letters --

SEN. SCHUMER: Those are public letters.

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MR. MCNULTY: -- may not be the only letters we've received. We may have received --

SEN. SCHUMER: I know, but phone calls, any other -- I'd like you to figure out for us and get us answers on whether there were other people, other than the people who signed -- I don't know who they were -- who signed the letters that Senator Sessions mentioned outside the Justice Department who said -- obviously, given the sensitivity of this this is an important question -- who said that Carol Lamb should be dismissed. Can you get back to us on that?

MR. MCNULTY: Yes.

SEN. SCHUMER: Thank you.

MR. MCNULTY: I'm only not giving you a definitive answer now because I'm trying to avoid talking about any one district --

SEN. SCHUMER: Okay.

MR. MCNULTY: -- but I -- but the suggestion of your question would be whether there might have been some -- let's just say on a general matter, not referring to any one district, any undue influence on us from some unnamed --

SEN. SCHUMER: Oh, no. I didn't ask that.

MR. MCNULTY: (Cross talk.)

SEN. SCHUMER: I didn't ask whether it was undue.

MR. MCNULTY: Generically, I can say that with any change we made, they weren't subject to some influence from the outside.

SEN. SCHUMER: All right. I would just ask that when you meet with us, we get an answer to that question. Who from the outside urged, whether appropriately or inappropriately -- it might be appropriate. It's certainly your job, if you think a U.S. attorney isn't doing a good job, to let that be known, that she be dismissed.

Okay, let me just ask you this. We're going to hear from a fine U.S. attorney from the southern district former, and she says in her testimony -- she quotes Robert Jackson as Attorney General, and he gave a noted speech to U.S. attorneys. He said this, "Your responsible in your several districts for law enforcement and for its methods cannot wholly be surrendered to Washington and ought not to be assumed by a centralized Department of Justice." Do you agree with that?

MR. MCNULTY: I'm not sure if I can say that I appreciate -- I agree with everything being said in that. You know, what's tricky about this is that -- Senator, you or any other senator in this committee might call us on another day and say to us, "I want to see more health care fraud cases done. You people have turned your back on that problem." And we would get back to you and say, "Absolutely, Senator. We'll take that seriously." But how could we do that if we didn't have some confidence that if we turned around and said to our U.S. attorneys, "We need you to prioritize health care fraud. It's a growing problem in our country and you need to work on it?" Now that's a centralized Washington responsibility going out to the field. So I believe in a Department of Justice that does act with some control over its priorities and its -- use of its

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resources. I don't believe, however, that that should go to the question of the integrity or the judgment --

SEN. SCHUMER: And he uses the words -- in all fairness, he uses the word "wholly." He doesn't say Washington should have no influence. He says "cannot be wholly surrendered to Washington."

MR. MCNULTY: Well then, I would agree with that.

SEN. SCHUMER: Yeah. Okay.

Final question, and I appreciate the indulgence of my colleagues here, and I'll extend to them the same courtesy. On the Feinstein-Specter bill, does the administration -- unless you want to answer that -- (off mike.) No? Okay.

I was --

SEN. SPECTER: No, wait a minute. Were you saying I only have 23 minutes and 28 seconds left? (Laughter.)

SEN. SCHUMER: Yeah, double that, if you wish.

Let's see -- then I'll ask it. What objection do you have to Feinstein's bill, the one that Senator Feinstein -- Senator Specter put in which restores a system which seemed to be perfectly adequate for 20 years, including in the Reagan administration, the Bush administration, and the first six years of this administration? Are you aware of any legal challenges prior to 2006 to the method of appointing U.S. interim attorneys?

MR. MCNULTY: Well, there are two issues or two legislative proposals that we seem to be talking about. One I think is, the bill I have in front of me, which is S. 214 -- if I'm reading it correctly, it goes beyond what was existed prior to the amendment in the Patriot Act. It gives the appointment authority to the district court -- the chief judge of the district -- completely. That -- and if I'm wrong, someone can correct me on that, but that's my reading on the legislation.

Now there's another idea on the table, which is to restore to what it was prior to the Patriot Act, which gave the Attorney General the authority to appoint someone for 120 days, and then the chief judge would appoint that person afterwards. Are you asking me about the latter more than the --

SEN. SCHUMER: Yeah, I'm asking you, would you have objection? Because as I understand it, the sponsors simply want to restore what existed before the Patriot Act changed. Would the administration be opposed to that? MR. MCNULTY: Our position, I think, would be opposition. But we recognize that that's better than what the original legislation is. And the reason is because we supported what was done in the Patriot Act because we think it cleaned up a problem that though it only came up occasionally, and in the great majority of cases the system did work out okay, when it does come up, it can create some very serious problems.

SEN. SCHUMER: But you used the new Patriot angle -- Patriot Act language to go far beyond the specific problem that occurred in South Dakota.

MR. MCNULTY: Well, that's kind of what we're here today to talk about. I don't think that's true, but I understand your perspective on it. And I think

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that if Arkansas -- if that Patriot Act provision had never passed, what would have happened in Arkansas? Would we have been prohibited from going in and asking someone to step aside and placing a new person in? No. It's just that the person would have served for 210 days, and then the chief judge would have had to re-up the person. So we may still be talking about what happened in Arkansas, and there's a linkage being made to that provision, and some initiative that we took afterwards. And there isn't any linkage in our minds.

SEN. SCHUMER: I would argue to you -- and this will be my last comment -- that knowing that there's an outside independent judge of an interim appointment is -- has a positive prophylactic effect, and makes you more careful as to -- make -- would make any executive more careful about who that interim appointment should be.

Senator Specter.

SEN. SPECTER: Thank you. Are you saying that the Department of Justice will not object to legislation which returns status quo antebellum, because this has been a war, prior to the amendments of the Patriot Act?

MR. MCNULTY: I'm not saying we will or we won't object because, sitting here at the table today, I can't take apposition on that legislation. I have to go back and have that decision made. I'm saying, though, that we support the law as it currently stands, and if we come back and object to the legislative idea that you have talked about here today, that would be the reason. But I'm not specifically saying today that we're going to object. We have to make a decision the appropriate way.

SEN. SPECTER: That's a "don't know."

MR. MCNULTY: Correct.

SEN. SPECTER: Would you be willing to make a commitment on situations where the attorney general has an interim appointment to have a presidential appointment within a specified period of time?

MR. MCNULTY: Don't know.

SEN. SPECTER: Well, that clarifies matters more --

MR. MCNULTY: I mean, I'd have to go back and think about that, but I understand the idea.

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SEN. SPECTER: I like -- I like brief answers and brief lines of questioning.

Would you consult with a home-state attorney -- home-state senator -- before the selection of an interim U.S. attorney?

MR. MCNULTY: We have not done that to date. It's --

SEN. SPECTER: I know that. Would you?

MR. MCNULTY: Well, it's something that's worth considering, and it can be a very helpful thing if --

SEN. SPECTER: Will consider.

MR. MCNULTY: Will we consider doing that? SEN. SPECTER: Well, that's what you're saying. I'm trying to find your answer here. Will consider.

MR. MCNULTY: Right. Yes, we'll consider that possibility.

SEN. SPECTER: All right, I have 24 more questions, but they've all been asked twice. (Laughter.) And I would like --

SEN. SCHUMER: It's good to be the chairman, isn't it? (Laughter.)

SEN. SPECTER: -- and I would like to -- I certainly enjoyed it. The gavel was radioactive when I had it. (Laughter.) And I would like to hear the next panel, so I will cease and desist. Thank you.

SEN. SCHUMER: Thank you, and I will still call you Mr. Chairman, out of respect for the job you did.

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Senator Whitehouse.

SEN. WHITEHOUSE: Thank you. Sorry to step out for a while. We have the Iraq budget down on the Budget Committee, so we're called in many directions here.

SEN. SCHUMER: (Off mike.)

SEN. WHITEHOUSE: Mr. McNulty, you said that the firings were performance-related and that there was a set procedure that involved career people that led to this action. To go back to The Washington Post, one administration official, says the Post, who spoke on the condition of anonymity in discussing personnel issues, said the spate of firings was the result of, and here's the quote from the administration official, "pressure from people who make personnel decisions outside of Justice" -- capital J, the department -- "who wanted to make some things happen in these places."

MR. MCNULTY: Whoever said that was wrong. That's -- I don't know where they'd be coming from in making a comment like that, because in my involvement with this whole process, that's not a factor in deciding whether or not to make changes or not. So I just don't know --

SEN. WHITEHOUSE: What is not a factor?

MR. MCNULTY: Well, that quote suggests agendas, political or otherwise, outside of the Department. And in looking at how to -- or who should be called or encouraged to resign or changes made they are based upon reasons -- they weren't based upon cause, but they were based upon reasons that were Department-related and performance-related, as we said. And so I don't ascribe any credibility to that quote in a newspaper. SEN. WHITEHOUSE: Okay. Would you agree with me that when you're in the process of selecting a United States attorney for a vacancy, it makes sense to cast your net broadly, make sure you have a lot of candidates, choose among the best and solicit input from people who are sort of outside of the law enforcement universe? Would you agree with me that it's different when you have a sitting United States attorney who is presently exercising law enforcement responsibilities in a district, how and whether you make the determination to replace that individual?

MR. MCNULTY: I think that's a fair concern, and one distinction that's important to keep in mind.

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SEN. WHITEHOUSE: You wouldn't want to apply the same process to the removal of a sitting U.S. attorney that you do when you're casting about for potential candidates for a vacancy?

MR. MCNULTY: I'm not sure I fully appreciate the point you're making here. Could I ask you to restate it so I make sure if I'm agreeing with you that I know exactly what you're trying to say?

SEN. WHITEHOUSE: Yeah. I think what I'm trying to say is that when there's an open seat and you're looking for people to fill it --

MR. MCNULTY: Yes.

SEN. WHITEHOUSE: -- you can cast your net pretty broadly, and it's fair to take input from all sorts of folks. It's fair to take input from people in this building --

MR. MCNULTY: Oh, I see what you're saying.

SEN. WHITEHOUSE: -- it's fair to take input from people, you know, in law enforcement. It's fair to take input from people at the White House. It's fair to take input from a whole variety of sources. But it's different once somebody is exercising the power of the United States government and is standing up in court saying, "I represent the United States of America." And if you're taking that power away from them, that's no longer an appropriate process, in my view, and I wanted to see if that view was shared by you.

MR. MCNULTY: I think I appreciate what you're saying there, and I think that when it -- you know, there's two points. The first is that we believe a U.S. attorney can be removed --

SEN. WHITEHOUSE: Of course.

MR. MCNULTY: -- for a reason or for no reason, because they serve at the pleasure of the president. But there's still a prudential consideration. There's got to be good judgment exercised here. And when that judgment is being exercised, there have to be limitations on what would be considered; I think that's what you're suggesting. And there's going to be some variety of

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factors that may or may not come out in an EARS report or some other kind of well- documented thing. But it comes down to a variety of factors that have to do with the performance of the job, meaning --

SEN. WHITEHOUSE: But they're truly performance-related, you don't just move around, because, you know, somebody in the White House or somebody in this building thinks, "You know what? I'd kind of like to appoint a U.S. attorney in Arkansas. Why don't we just clear out the guy who's there so that I can get my way." That person might very well, with respect to a vacancy, say, "I want my person there," and that's a legitimate conversation to have, whether you choose it or not. But it's less legitimate when there's somebody in that position, isn't it?

MR. MCNULTY: Yeah, I hear the distinction you're trying to make there. I'm not sure I -- I agree with it. The change that is occurring by bringing a new person in versus the change that's occurring by bringing a person in to replace an interim, I'm not sure if I appreciate the dramatic distinction between them. If the new person is qualified and if you're satisfied that it's not going to interfere with an ongoing case or prosecution, it's not going to have some general disruptive effect that not good for the office --

SEN. WHITEHOUSE: Well, there's always some disruptive effect --

MR. MCNULTY: There is always some, right. The question is is it undue or is it substantial beyond the kind of normal turnover things that occur? I think that there needs to be flexibility there to make the changes that need to be made.

SEN. WHITEHOUSE: Finally, have the EARS evaluations changed since I had the pleasure of experiencing one? Do you still go and talk to all the judges in the district? Do you still go and talk to all the agencies that coordinate with the U.S. attorney's office in the district? Do you still go and talk to community leaders, like the attorney general and police chiefs who are regular partners and associates in the work of the Department of Justice in those areas?

MR. MCNULTY: That's right. And I don't know if you were in the room when I was having this exchange with Senator Schumer, but I want to say it one more time to make it clear. We are ready to stipulate that the removal of U.S. attorneys may or may not be something supported by an EARS report because it may be something performance-related that isn't the subject of what the evaluator saw or when they saw it or how it came up, and so forth. And I -- I go back to this point because I know that your and Senator Schumer's interest in seeing them is because you want to see -- you want to try to identify the thing and say, "Well, there's justification," or there's not, right? And if there's not,

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the assumption should not be made that therefore we acted inappropriately or that there wasn't other performance-related information that was important to us.

SEN. WHITEHOUSE: No, but given the scope of the EARS evaluations -- which really went into every nook and cranny of the operational scope of my U.S. attorney's office -- the idea that there is something else somewhere that might appear and justify the removal of a United States attorney, and yet the -- something that all of the judges in the district -- all of the federal law enforcement agencies in the District, the police chiefs and other coordinating partners with that U.S. attorney -- that all of them were completely unaware of and that never surfaced in the EARS evaluation would be somewhat of an unusual circumstance, and I think would require a little bit of further exploration.

MR. MCNULTY: Well, I appreciate the need for further explanation, and I -- and that's where we're committed to working with you to get the answers you're looking for. But maybe EARS reports have changed a bit, but there -- maybe the management of the Department of Justice has changed a bit too, because when we announce priorities, we mean it. And priorities, and how an office has responded to those priorities, may not be measured by the evaluators the way that other things -- the more nuts and bolts things -- are, and that's where those reports are very valuable, but they don't always tell the full story.

SEN. WHITEHOUSE: We'll follow up.

Thank you, Mr. Chairman.

SEN. SCHUMER: Senator Sessions?

SEN. SESSIONS: Thank you. It's a most interesting discussion. I do have very, very high ideals for United States attorneys. I think that's a critically important part of our American justice system. I think sometimes that the Department of Justice has not given enough serious thought to those appointments -- has not always given the best effort to selecting the best person.

President Reagan, when he was elected and crime was a big problem, he promised experienced prosecutors, and I think that was helpful. I'd been an assistant for two years and -- two-and-a-half years and that's how I got selected. And I did know something about prosecuting cases. I'd tried a lot of cases, and I was -- I knew something about the criminal system. So I think Giuliani is correct -- you need to have somebody to contribute to the discussion -- that knows something about the business. With regard to Arkansas, I just took a quick look. I don't think that Mr. Cummins had any prior prosecutorial experience before he became U.S. attorney, did he?

MR. MCNULTY: That's correct. He did not.

SEN. SESSIONS: But Mr. Griffin had at least been a JAG prosecutor in the military and been to Iraq and he tried people there, had he not?

MR. MCNULTY: Tim Griffin had actually prosecuted more cases than a lot of U.S. attorneys who go into office. A lot of people come from civil backgrounds or policy backgrounds, and he actually had been in court, whether it's as a JAG here in Ft. Campbell, where he tried a very high profile case, or

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over in Iraq or as a special assistant in that office. And I don't think we should look lightly upon his experience as a prosecutor.

SEN. SESSIONS: And he spent a good bit of time with General Petraeus, I guess -- well, the 101st in Mosul, Iraq with the -- as an Army JAG officer. So anyway, he had some skills and experience beyond politics. But I just -- I want to join with Senator Schumer and my other colleagues in saying I think we need to look at these appointments maybe in the future more carefully. It's a tough job. You have to make tough decisions. I remember -- I guess I took it as a compliment -- people said that Sessions would prosecute his mother if he -- she violated the law. I guess that was a compliment; I took it as -- tried to take it as that. So I wanted to say that.

With regard to the problem of a judge making this appointment, you end up, do you not, with a situation in which the judge is appointing the prosecutor to try the poor slob that's being tried before him?

MR. MCNULTY: Right.

SEN. SESSIONS: In other words, here he's appointing the guy to try the guy, and that really is not a healthy approach for a lot of reasons, and it's not consistent with the Constitution, to my way of thinking, which gives the oversight to U.S. attorneys to the Senate in the confirmation process, and to some degree the House because they got financial responsibilities and so forth. Is that a problem in your mind -- that a judge would actually be choosing the person and vouching for the prosecutor who will try the defendant that he's required to give a fair trial to?

MR. MCNULTY: We've cited that as one of the issues that justified the provision that was in the Patriot Act.

SEN. SESSIONS: And is there any other circumstances which federal judges appoint other agencies -- other officers of other federal agencies that you know of? MR. MCNULTY: I'm not aware of a situation where someone in another agency -- I know certainly situations where someone from private practice was appointed, and that creates difficulties because of --

SEN. SESSIONS: No, I'm really talking about do they ever -- do they have any authority if there's a uncertainty over a Department of Treasury official or a Department of Commerce official -- that a federal judge --

MR. MCNULTY: Oh, I see your question.

SEN. SESSIONS: -- would appoint those appointments?

MR. MCNULTY: No, this is unique actually, and I think that's another argument --

SEN. SESSIONS: Yeah. I don't think it's a -- I think it's a serious matter. Now Senator Schumer, let's think about this. Would it help -- and I'll ask you your comments, Mr. McNulty -- if we had some sort of speedy requirement to submit the nominee for confirmation and that gives the oversight to the Senate where the Constitution seems to give it? How would you feel about that?

MR. MCNULTY: I appreciate what you're trying to do there, and we agree with the spirit of that -- that we want to get the names up here as fast as possible. The problem is we don't control completely the process for getting

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the names, because when we're working with home state senators or some other person to provide names to us for us to look at, that's a step that's beyond our control, and it could create problems if there's a set timetable --

SEN. SESSIONS: Well, it could create problems for you, but you're going to have some sort of problems because you're not unilaterally empowered to appoint United States attorneys. You don't have any unilateral right, so somebody's going to have some oversight.

MR. MCNULTY: Yeah.

SEN. SESSIONS: In the other system you had 120 days and the federal judge had the responsibility. So you can't have it like you'd like it.

MR. MCNULTY: Well, I appreciate that and I'm not trying to sound greedy. I'm just saying that there -- if we're talking specifically about the idea of a timetable that's what we'd have to look at. I'd actually like to see the committee just judge us on our track record, and look at the openings -- look at the interims, look at the nominees, and how long it takes to get to a nomination and then the confirmation. And based upon the track record, that's the oversight -- that's the accountability. And I think the record we have is pretty good. I'd like to say one other thing, Senator. Your experience in Alabama and Senator Schumer's experience in New York I think illustrates how appointing somebody to come into a district as an interim who may eventually get nominated and confirmed can be a very positive thing. Both in Senator Schumer's case, where my predecessor, Jim Comey, was actually an assistant United States attorney in my office in eastern Virginia, and he came up as an assistant to New York to be the interim, sent by main Justice to New York, but he had connections there and a root there as a -- where he started his career. And he was an interim, and then he got nominated for that position later. And then the same thing happened in south Alabama. And it can be a very positive way of dealing with a vacancy and putting a competent person in place that doesn't come from within that same office.

SEN. SESSIONS: I do think that we have a responsibility to at some point confirm United States nominees if there's time sufficient to do so because -- but the position cannot go vacant. Somebody's got to hold the job in every district at some point in time because the work of the office can't continue without somebody as the designated United States attorney. So I would note that I don't know Arkansas -- I think you've learned that you got to be careful with these offices. They -- there are perceptions out there.

Senator Pryor's concerned about this appointment. He's a good man -- former attorney general. It would have been better I think had you been a little more careful with that appointment, although the nominee I think is -- got a far better track record than some would suggest -- the new U.S. attorney. I would note that we could give -- I'll just say it this way. Most of us in the Senate do not review the U.S. attorney appointee -- appointments personally. Staff reviews that and we hear if there are objections and get focused on it if there's a problem.

I think we all probably should give a little more attention to it. And we hold the administrations, as they come forward, to high standards about appointments, because it's a very important office.

MR. MCNULTY: Senator Sessions, to be clear on Arkansas, Tim Griffin is an interim appointment. And consulting with Senator Pryor and Senator Lincoln

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has been going on for some time. And a nomination in that district will be made in consultation with them. In fact, we'll even take his statement that he made here today and look at it closely and see what it is.

He said today he's going to Attorney General Gonzales. That's the process that we're committed to following. There's no effort there to go around Senator Pryor or Senator Lincoln and find a nominee that they wouldn't support. And so that approach in Arkansas has been the same that we've used in all the other places where we seek the guidance and the input from the home-state senators as we look for someone we can get confirmed by the Senate.

SEN. SESSIONS: I would just conclude by noting that there is a danger when politicians get involved in appointments, and particularly when United States attorneys have to make a tough-charging decisions like the border patrol shooting and other things like that. And we've got to be real careful about that.

I would just say, though, when it comes to priorities of an assistant United States attorney or the Department of Justice or a U.S. attorney, then I think if -- I think the political branch does have a right to question whether the right priorities are being carried out.

Thank you, Mr. Chairman.

SEN. SCHUMER: Well, thank you.

And I want to thank you, Mr. McNulty. This is not an easy thing for you to come and testify to. And I appreciate your candor, admitting that Bud Griffin (sic/Cummins) was not fired for any particular reason.

Your willingness to come and talk with us so we can figure out exactly what went on this week -- as well as your inclination to both submit the EARS reports and give us information about any outside influences on this -- that will be very helpful not only here, but in establishing a smooth working relationship between this committee and the Justice Department and the new Congress. And the proof of the pudding, obviously, is going to be in the eating, but I think we look forward to getting real information about what happened here.

Thank you.

Okay. Let me call our next three witnesses and appreciate them for their patience.

The first is Mary Jo White. She's currently a partner at the New York law firm of Debevoise & Plimpton, the first and only woman to have served as the U.S. attorney for the Southern District, which many view as the best federal prosecutor's office in the country. Ms. White has a lot to do with the fine reputation of that office, and her own reputation for excellence and integrity is unparalleled. A graduate of William & Mary and Columbia Law School. She was an officer of The Law Review. And I also owe her a personal debt of gratitude, because my chief counsel, who's done a great job here, Preet Bharara, sort of worked under her when she lured him away from private practice and he's still there.

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Professor Laurie Levenson is currently the professor of law and William M. Rains Fellow at Loyola Law School in Los Angeles. She teaches criminal law, criminal procedure, ethics, anti-terrorism and evidence. Prior to joining the faculty at Loyola Law School, Ms. Levenson spent eight years as an assistant U.S. attorney where she prosecuted violent crimes, narcotic offenses, white-collar crimes, immigration and public corruption cases. She's a graduate of Stanford and the UCLA Law School where she was chief articles editor for The Law Review.

Stuart Gerson is currently head of litigation -- the litigation practice at the law firm of Epstein Becker & Green. He joined as a partner in 1980. Prior to his return to private practice, Mr. Gerson served as assistant attorney general for the Civil Division at the Department of Justice under both President H.W. Bush -- George H.W. Bush -- and later as acting attorney general under President Clinton. He served as an assistant U.S. attorney in the District of Columbia and is a graduate of Penn State and the Georgetown University Law Center.

(The witnesses are sworn.)

Ms. White, you may proceed.

MS. WHITE: Thank you very much, Senator Schumer, Senator Specter.

I'm honored to appear before you today. I've spent over 15 years in the Department of Justice both as an assistant United States attorney -- the best job you could ever have -- and as United States attorney. I served during the tenures of seven attorneys general of both political parties, most recently John Ashcroft. I was twice appointed as an interim U.S. attorney, first in the Eastern District of New York in 1992 by Attorney General William Barr -- and I heard from Mr. Gerson that he also had a hand in signing those papers -- and then in 1993, appointed as interim U.S. Attorney in the Southern District of New York by Attorney General Janet Reno. Most recently, as Senator Schumer indicated, I served for nearly nine years as the presidentially appointed U.S. attorney in the Southern District of New York from 1993 until January 2002.

Before I comment substantively on the issues before the committee, let me make very clear up front that I have the greatest respect for the Department of Justice as an institution, and I have no personal knowledge of the facts and circumstances regarding any of the reported requests for resignations of sitting United States attorneys. Because I do not know the precipitating facts and circumstances, I'm not in a position to either support or criticize the particular reported actions of the department and do not do so by testifying at this hearing.

I am, however, troubled by the reports that at least some United States attorneys, well regarded, have been asked by the department to resign without any evidence of misconduct or other apparent significant cause. And I -- you know, I do find that troubling. I think that the appearance -- if it happened, in particular -- but even the appearance of that tends to undermine the importance of the office of the United States attorney, their independence and the public sense of evenhanded and impartial justice.

Casual or unwisely or insufficiently motivated requests for U.S. attorney resignations -- or the perception of such requests -- diminish our system of justice and the public's confidence in it. United States attorneys are political appointees who do serve at the pleasure of the president. It is thus

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customary and expected that the U.S. attorneys, generally, will be replaced when a new president of a different party is elected. There is also no question that presidents have the power to replace any United States attorney they have appointed for whatever reason they choose. In my experience and to my knowledge, however, it would be unprecedented for the Department of Justice or the president to ask for the resignations of U.S. attorneys during an administration, except in rare instances of misconduct or for other significant cause. This is, in my view, how it should be.

U.S. attorneys are the chief law enforcement officers in their districts, subject to the general supervision of the attorney general. Although political appointees, the U.S. attorneys once appointed play a critical and nonpolitical, impartial role in the administration of justice in our federal system.

Senator Schumer alluded to this, but in his well-known address to the United States attorneys in 1940, then-Attorney General Robert H. Jackson, although acknowledging the need for some measure of centralized control and coordination by the department, emphasized the importance of the role of the U.S. attorneys and their independence. He said, "The prosecutor has more control over life, liberty and reputation than any other person in America. His discretion is tremendous. Because of this immense power, the post of United States attorney, from the very beginning, has been safeguarded by presidential appointment, requiring confirmation of the Senate of the United States. Your responsibility in your several districts for law enforcement and for its methods cannot be wholly surrendered to Washington and ought not to be assumed by a centralized Department of Justice. Your positions are of such independence and importance that while you are being diligent, strict and vigorous in law enforcement, you can also afford to be just."

In my view, the Department of Justice should guard against acting in ways that may be perceived to diminish the importance of the Office of United States Attorney or of its independence, taking nothing away from the career assistant United States attorneys and other career attorneys in the Justice Department.

Changing a United States attorney invariably causes disruption, and often loss of traction in cases and investigations. This is especially so in sensitive or controversial cases where the leadership and independence of the U.S. attorney are often crucial to the successful pursuit of such matters, particularly in the face of criticism or political backlash.

Replacing a U.S. attorney can, of course, be necessary or part of the normal and expected process that accompanies a change of the political guard. But I do not believe that such changes should, as a matter of sound policy, be undertaken lightly or without significant cause.

If U.S. attorneys are replaced during an administration without apparent good cause, the wrong message can be sent to other U.S. attorneys. We want our U.S. attorneys to be strong and independent in carrying out their jobs and the priorities of the department. We want them to speak up on matters of policy, to be appropriately aggressive in investigating and prosecuting crimes of all kinds and wisely use their limited resources and broad discretion to address the priorities of their particular districts.

In my opinion, the United States attorneys have historically served this country with great distinction. Once in office, they become impartial

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public servants, doing their best to achieve justice without fear or favor. I am certain that the Department of Justice would not want to act in such a way or have its actions perceived in such a way to derogate from this model of the nonpolitical pursuit of justice by those selected in an open and transparent manner.

Thank you very much. I'll be happy to answer questions.

SEN. SCHUMER: Thank you, Ms. White.

Professor Levenson.

MS. LEVENSON: (Off mike.) Does that work now?

SEN. SCHUMER: Yes.

MS. LEVENSON: Okay. I served in the United States attorney's office for four different United States attorneys of both parties and one interim United States attorney. I believe that we, in fact, have the best prosecutorial system in the world. But I'm here because I fear that the operation of that system and its reputation for excellence is jeopardized because of the increased politicization of the United States attorney's offices.

As this committee knows, the most recent concerns have focused on a rash of dismissals of experienced and respected United States attorneys across the country. There's at least a strong perception by those in and outside of the United States attorney's office that this is not business as usual, that qualified United States attorneys are being dismissed and their replacements who are being brought in do not have the same experience and qualifications for the position.

Moreover, there's a deep concern that the interim appointments by the attorney general will not be subject to the confirmation process, and therefore there will be no check on those qualifications and the interests of the offices will be sacrificed for political favors.

I want to make three basic points in my testimony today. One, politicizing federal prosecutors does have a corrosive effect on the federal criminal justice system. It is demoralizing to AUSAs. These are the best and the brightest, who go in there because they are dedicated public servants. And they expect their leaders to be the same.

It's also, as we've heard, disruptive to ongoing projects. It creates cynicism among the public. It makes it harder in the long run to recruit the right people for those offices. And as Mr. McNulty said, if you lose the AUSAs, you lose the greatest assets of all.

Second, although there's always been a political component to the selection of United States attorneys, what is happening now is categorically different. Traditionally we saw changeover when there was a new administration. Thus when President Clinton came in, he had every right and did ask for those resignations.

But we have never seen what we're seeing today, which is, in quick succession, seven U.S. attorneys who have excellent credentials, successful records and outstanding reputations being dismissed midterm. And we've never seen their interim replacements, at least some of them, coming in with the lack

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of experience and qualification they have and being put in on an interim basis indefinitely without the prior process that we had for evaluation.

We all recognize that federal prosecutors serve at the pleasure of the president, and the Department of Justice controls many of the policies and the purse strings. But it has been a strong tradition of local autonomy and accountability and continuity that has made these district U.S. attorneys successful, not the arbitrary dismissals in order to give others a fresh start. This is an important tradition. With local autonomy and continuity comes a greater ability to serve the needs of the district.

Third, and finally, in my opinion the prior system, which allowed the attorney general to indeed appoint the interim U.S. attorney for 120 days, and then if there's no confirmed U.S. attorney have the chief judge make an interim appointment, was not only constitutional, but frankly had advantages over the most recently placed provisions.

First, it's constitutional because, under the appointments clause and the accepting clause to that, inferior officers, which U.S. attorneys are, may be appointed by the president, courts of law or heads of department. And under the Supreme Court's decision written by Chief Justice Rehnquist in Morrison versus Olson, the role of judges in appointing prosecutors has been held to be constitutional. In that case, which dealt with independent counsel, the court cited a lower court case dealing with interim U.S. attorneys, and cited it favorably.

I don't think any of the panelists today and any of the witnesses I heard today, in fact, challenge the constitutionality of having judges in the process. But as Mr. Gerson eloquently states in his written testimony, it's one of congressional discretion.

As a matter of discretion, I think that the prior system, the one that Senators Specter and Feinstein are talking about returning to, has strong benefits in comparison to the new approach. Under that approach, the attorney general makes the initial appointment. It gives plenty of time to the department to come up with a nominee and present that nominee. And then, if that is not able to happen in a timely fashion, the chief judge starts making appointments.

And can chief judges do this in a fair way? Not only can they, but they have for decades. And that's because, in my experience, frankly the chief judges know the district often better than the people thousands of miles away in the Department of Justice. They know the practitioners in their courtrooms. They care about the cases in their courtroom. And those judges have the credibility and confidence of the public in making their appointments. They appoint magistrate judges and they even appoint federal public defenders, while not government officials, nonetheless, readily and regularly appear before those judges.

I personally have never heard and seen of a case where a judge exerted any pressure on the appointment of an interim U.S. attorney or when that person appeared before them because he had made that appointment. And I think we have to compare it to the current system under the Patriot Act, where only the attorney general is involved in the process and those interim appointments can be forever. And there may be no or little oversight by the Senate because there is not the traditional confirmation process.

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So in conclusion, I'd like to say that whether or not the current attorney generals' recent actions have been in good or bad faith, their impact has been the same. It has demoralized the troops. It has created the perception that politics is playing a greater role in federal law enforcement. And it has stripped the Senate of its important role in evaluating and confirming the candidates.

In my opinion, the healthiest thing to do is not to rely just on what I'm sure are the sincere promises of the Department of Justice officials of what they're not going to do with this interim power, but to put in some statutory scheme that allows flexibility of interim appointments but still has accountability. That would mean the attorney general could make some interim appointments but would restore the Senate's role as a check and balance.

With that, I welcome any questions from the committee. Thank you.

SEN. SCHUMER: Thank you, Professor Levenson.

Mr. Gerson.

MR. GERSON: Mr. Chairman, Senator Specter, it's a great delight always to testify before this committee, especially as an old Justice Department hand. I'll concur. My wife thinks the best job I've ever had is being her husband. But in terms of what I got paid to do, certainly being an assistant United States attorney was a terrific job.

And let me talk to a couple of contrarian issues.

But first, Senator Schumer, given the lateness of the hour, I ask your parliamentary discretion in incorporating my written testimony as if read here and in full.

SEN. SCHUMER: You are indeed an old Justice Department hand. Thank you.

Without objection, Mr. Gerson's entire statement will be read into the record.

MR. GERSON: Thank you.

I came here different, perhaps, from anybody else, with an agenda. And coming last, I have the pleasure of having seen that agenda satisfied. I thought and think that S. 214 is a very bad idea. I thought that Senator Feinstein's reaction, while understandable, was not finely enough drawn. And certainly returning to the previous method of appointments serially of interim United States attorneys is vastly superior to what was being proposed, which was taking the executive branch out of an executive function. But that battle now has been won.

I urge you, though, to have hearings on it, because it's not -- the idea of including the judiciary at all is not without problems. Different from Ms. Levenson, I actually know and have experienced some cases where judicial intervention has proved ill-advised and badly directed.

But at the end of the day, I came here to speak for the Constitution, and I think the Constitution has gotten a good break out of the day, that we function best when the executive does things that are committed to the executive

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branch, the legislature does things that are committed to the legislative branch, and the judiciary fulfills a judicial function, and that those roles, when stuck to, create the right kind of dynamic tension that the framers had in mind and which has made our written Constitution the oldest written constitution in the world.

There's a certain sense of deja vu in all of this. One of the reasons, perhaps, that I was invited is I probably superintended the most dismissals of United States attorneys that anybody ever did, and I did it accidentally when, by force of circumstances -- and Senator Schumer and Senator Specter remember my unusual circumstance when I ended up as the long-term acting attorney general. That had never happened in American history, where a president was saddled for more than a few days with an attorney general of the other party. There's something to be said for that, by the way.

And in this case, it was easy to support President Clinton's decision to dismiss U.S. attorneys, many of them on the same day, many of them that had served full terms, and many of them that were involved in ongoing investigations, because it was a presidential prerogative.

And I just note with some irony that I was accused by some of my colleagues of being involved in the termination of the United States attorney in Arkansas, who was in the midst of -- actually she had recused herself, but the office was in the midst of the Whitewater investigation, and that was alleged to have been a cover-up on behalf of President Clinton.

Of course, pressure then turned that occupation over to a judicially selected officer and created the situation where a prosecutor responsible to the judicial branch caused a great deal of discomfort both to the president and to what is now the Democrat majority. And I urge everyone to remember that in looking at the role of the judiciary in a restored context to the one that Senator Schumer, I think, accurately described.

The greatest value of the judiciary is it tells the other -- not just the executive branch, but the legislative branch -- to get on with their constitutional business and move on to permanent United States attorneys with due speed. That's the value of the judicial part of it, not judges picking prosecutors, because that's an anomalous role for the judiciary.

Let me also address one other point, and that's -- I'm as great an admirer of Justice Jackson as anyone and have learned a lot about what the political branches should do and shouldn't do from reading Justice Jackson. But I want to say a word on behalf of centralization and the proper role of politics.

I've seen much of this before. I've dealt with problems between senators and presidents for many years. Senator Specter and I and Senator Heinz resolved an issue in the Reagan administration where there was a dispute of who should be the United States attorney for the eastern district of Pennsylvania.

These disputes are old and oftentimes difficult. But it should be remembered that there were many valid reasons why the main Justice component of the Justice Department ought to be able to exert its will over United States attorney's offices in a prudent way and why perhaps it hasn't happened enough.

I cite several instances of where I myself felt compelled to act and think that I did justice. I'm of an age where some of the things I remember

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best perhaps didn't happen and I'm informed that at least one of my examples may be flawed. Although what I state is true, I attribute something to the then-U.S. attorney for the southern district of New York that perhaps I shouldn't have. I apologize to him, and will personally if I have contradicted his memory.

But several cases immediately came to mind where I know that United States attorneys were not adequately attending to national priorities. One was in the savings-and-loan crisis. It was very clear that a centrally directed civil system was vastly outperforming the dispersed, decentralized way that the criminal cases in the savings-and-loan area were being handled, and there were many U.S. attorneys that didn't do a good job. And it wasn't until main Justice imposed task forces on them that that situation improved.

And then I pointed out, lastly, a situation that I had where, if I had listened to the United States attorney and indeed to the chief judge of the district in which the case was being tried, I would have been complicit in what I thought was an act of racial discrimination in jury selection, albeit involving a minority public official of the opposite party to me. I felt it important to impose my will on the United States attorney.

I think that justice was done. It didn't matter to me that it was criticized. It was fairly illuminated in the public record, and that's all that really mattered. But it was certainly something that was warranted no matter how many people I displeased and no matter what an ill effect I might have had on the morale in the given office.

I don't know that morale generally in the United States attorney's offices is being challenged. I haven't seen it. And I do work that involves a lot of United States attorneys. I subscribe to Mary Jo White's analysis of what a United States attorney's office ought to be. I hope that my career, in retrospect, will be reviewed and held as consistent with that tradition.

I know that I got a great deal of support from main Justice when I was a prosecutor of cases that weren't generally popular, including the prosecution of a United States senator, including being involved in one of the more controversial Watergate cases. And it was people like Henry Petersen, the legendary figure who was then the head of the criminal division, who provided a lot of support for what a rookie line assistant, assistant U.S. attorney, thought needed to be done. And that tradition still is present.

Somebody I got to know in my early days the first time I was in the Justice Department is Dave Margolis. You heard about him earlier, and I know he's a person who is familiar to you. It's not the practice of the Justice Department to throw career people to the winds of political judgments and political testimony, but he and so many other people are the folks who make this system go. They're there whoever are United States attorneys. Every office has them. And Ms. White and I have been honored, as has Ms. Levenson, been honored to serve with people like that. So I happily conclude my remarks noting that what I came here to do was achieved when Senator Feinstein took her seat and announced what I think is a beneficial compromise.

Thank you.

SEN. SCHUMER: Thank you, Mr. Gerson. And we did say we'd try to wrap up by 12:30, so I'll keep my questions brief. And we may submit some others in writing.

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First to Mary Jo White. Do you think -- first, what should be the standard for firing a presidentially appointed U.S. attorney? What have you understood the historical standard to be? And is it ever wise or appropriate to fire a Senate-confirmed U.S. attorney simply to give another person a chance?

MS. WHITE: Senator, in answer to that, clearly the president has the power to remove any U.S. attorney for any reason or no reason, but as a matter of policy and as a matter of precedent as well, that, in my experience during an administration, has not been done and I don't believe should be done, absent evidence of misconduct or other significant cause. And I think we have to be careful about the slippery slope of performance-related, because I don't think a U.S. attorney is like any other employee in the sense that it's a presidential appointee. It should be for serious significant cause. It does cause disruption, it does cause a tremendous appearance problem, it can disrupt cases. So I think the historical pattern has been absent misconduct or significant cause that you don't unseat a sitting U.S. attorney.

SEN. SCHUMER: What you say makes a great deal of sense. Even assuming that some people were unhappy with the priorities, say, of Miss Lamb -- I mean, the problems that this has created, I'll bet the Justice Department wishes they hadn't done what they did. And we don't know the record. Maybe there's some smoking gun, but it's hard -- it's difficult to believe that, given the external reports.

Professor Levinson, I just want to ask you since I read your testimony last night and heard it again here with care, did you find the statement -- I won't call it an admission -- of Deputy Attorney General McNulty that he -- that they removed the Arkansas U.S. attorney -- well, I was going to say troubling, shocking, unprecedented. Would you disagree with any of those words?

MS. LEVINSON: No, I wouldn't. I mean, in some ways it was refreshing to hear him say outward that --

SEN. SCHUMER: You bet.

MS. LEVINSON: -- he fired him not because he had done anything wrong, but because they wanted to give somebody else a political chance. That's precisely the problem. The job of U.S. attorney should not be a political prize. There's too much at stake for the district and for the people who work in that office.

SEN. SCHUMER: Right. And finally, to Mr. Gerson, in your time at the Justice Department, which is extensive, did you ever see a U.S. attorney asked to resign for no reason other than to give someone else a shot? MR. GERSON: Yes.

SEN. SCHUMER: Want to give us the example?

MR. GERSON: Well, I can't give you a name, and I've tried to think back over this. It was certainly suggested to individuals during my time at the midterm that perhaps it was time to do something else. I --

SEN. SCHUMER: In the two-year or the four-year?

MR. GERSON: Four-year.

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SEN. SCHUMER: Four-year.

MR. GERSON: Four-year. But I note that all of -- it would seem -- I don't want to be an apologist for anybody here, and I agree with you that the situation in San Diego is worth examining. I know that the person who was deposed, I thought her to be a very fine lawyer, but I don't know any of the circumstances. I dealt with her in health care cases, where she was quite vigorous, not in immigration cases that I have nothing to do with.

But all of the individuals involved seemed to have served four years and were in a subsequent term, and I think that's worth knowing. They'd been allowed to serve that time, and I guess I'm taking a contrarian view, which is I don't want to adopt some categorical vision that there's anything inherently wrong with looking at an organization while it's healthy and making a change. I don't carry any presumption that if someone is doing a good job, they're automatically entitled to continue. On the other hand, I'm a conservative in most every way, and I believe in least action, and I generally try to do something for a reason. And I don't conceive that I'd have made a change without a reason to do so.

SEN. SCHUMER: Final question to you, sir. Given the fact that the replacement in the seven we talked about was probably contemplated before the day they were actually dismissed, isn't 120 days enough?

MR. GERSON: It should be. Yeah, I'd -- it should be, but it should be -- let me make it clear. I -- Senator Specter and I have argued with each other over almost three decades now on separation questions. I knew him when he was the D.A., so I go back a ways.

SEN. SPECTER: (Off mike.)

MR. GERSON: (Laughter.) We were both very young.

I think that it should be a notice both to the executive branch and to the legislature. I don't think that we benefit from having interim anything for a long period of time, and that ought to move expeditiously to having permanent people who whether or not it's constitutionally required, as a matter of constitutional custom, have their nominations submitted to the Senate, and the Senate give advice and consent.

SEN. SCHUMER: Thank you.

Senator Specter.

SEN. SPECTER: I thank you -- I thank Mr. Chairman. I haven't been in a situation like this. The chairman wants to end this hearing at 12:30. It's now 12:29-and-a half.

SEN. SCHUMER: You can speak as long as you wish.

SEN. SPECTER: I haven't been in a situation like this since I was invited in 1993 to be the principal speaker at the commissioning of the Gettysburg in Maine. And when I looked at the speaker's list, I was ninth. There was an admiral from Washington, there was an undersecretary of State, there was the governor, there was Senator George Mitchell, there was Senator Bill Cohen, and I was called upon to speak at 4:32. And I was told as I walked to the podium that the commissioning had to be at 4:36 -- (laughter) -- because

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that's when the tide was right. So this brings back fond recollections to be called upon after all the time has expired.

SEN. SCHUMER: Well, I just want to remind my colleague a rising tide lifts all boats. (Laughter.)

SEN. SPECTER: I only wish there were a rising tide in Washington. (Laughter.) But we have the power in the Senate to change the clock. I was on the Senate floor one day when we had to finish activity by midnight, and we stopped the clock at 10 minutes to 12 --

SEN. SCHUMER: I heard about that.

SEN. SPECTER: -- until we finished our work.

But on to the serious questions at hand for no more than three minutes. Mr. Gerson, it's been a very important subject today as to what was a person's best job. Now you testified that your wife thought being her husband was your best job, but it seems to me that begs the question. Did you think that was your best job? (Laughter.)

MR. GERSON: I'd darn well better.

SEN. SPECTER: Well, that clears the air on that.

In Morrison v. Olson, the appointment of a special prosecutor was up, and the special prosecutor statute provided that the appointing judge could not preside over any case in which a special prosecutor was involved. Ms. White, do you think we might bring that rule to bear so that if we have the chief judge make the appointment after 120 days that the prosecutor ought not to be able to appear before that judge? MS. WHITE: Certainly, I think that's wise particularly from an appearance point of view, whether dictated as a matter of constitutional law. And again, I did not go into the subject of the best mechanism for appointing interim U.S. attorneys because I think the solution that seems to be on the table -- not perfect, at least in my view -- is probably the best one, achieving the best balance. Not without its issues, though.

SEN. SPECTER: Professor Levinson, don't you think it would be a good idea when there is a change of administration to at least make some sort of an inquiry as to whether the firing of all -- there were only 92 U.S. attorneys fired by Attorney General Gerson, as I understand it. I understand they kept Chertoff in North ---- in Jersey at the request of Senator Bradley to put to -- not that that wasn't political, but don't you think there ought to be some inquiry as to what's happening, and whether there's some politically sensitive matter so that you just don't have a carte blanche rule?

MS. LEVINSON: Well, I do --

SEN. SPECTER: Whoa, wait a minute. I haven't finished my question. And don't you think that Attorney General Gerson acted inappropriately in firing all of those people when Clinton took office? After all, Ruckle's (ph) house resigned and Richardson resigned. They wouldn't fire Archibald Cox. Do you think that Gerson was the Bork of his era? (Laughter.)

MS. LEVINSON: I think the record speaks for itself, Senator.

DAG00001054

SEN. SPECTER: He's already had his turn. I want an answer, Professor Levinson. (Laughter.)

Just kidding, just kidding. How about it, Mr. Gerson -- former Attorney General Gerson?

MR. GERSON: Well, I don't criticize Mr. Bork, either. I mean, the buck had to stop at some point in order to have a Justice Department. But there's a difference. I also think that the process worked well, even though it had a negative --

SEN. SPECTER: It had to stop at some point to have justice, you say?

MR. GERSON: To have a Justice Department. Somebody's got to run the place. I don't think everybody --

SEN. SPECTER: What was wrong with Cox?

MR. GERSON: Well, I don't think anything was wrong with Cox, and I think the upshot -- I think the system worked. I mean, ultimately the wrongdoing of that administration was exposed, and the president resigned in the wake of a continuation of the special prosecutor's function. You can't escape it, and I think that's the point that good oversight makes, and why when all the political branches -- both political branches do their job, justice will be served.

SEN. SPECTER: Oh, I think this question has been very thoroughly aired. Very thoroughly aired. I can't recall a three-hour and 36-minute hearing under similar circumstances, and I await the day when Chairman Schumer is chairman of the full committee to see us progress in our work.

Thank you all very much.

MS. LEVINSON: Thank you.

SEN. SCHUMER: Thank you. And I want to thank Senator Specter and all three witnesses for their excellent testimony. I think it's been an excellent hearing, and I have a closing statement that I'll submit to the record -- for the record.

Thank you.

END.

DAG00001055

**Moschella, William**

---

**From:** Hertling, Richard  
**Sent:** Wednesday, February 28, 2007 12:50 PM  
**To:** Moschella, William; Goodling, Monica  
**Subject:** FW: Urgent

Nothing from NM in OLA.

-----Original Message-----

**From:** Scott-Finan, Nancy  
**Sent:** Wednesday, February 28, 2007 12:18 PM  
**To:** Hertling, Richard; Burton, Faith  
**Subject:** RE: Urgent

-----Original Message-----

**From:** Hertling, Richard  
**Sent:** Wednesday, February 28, 2007 12:11 PM  
**To:** Burton, Faith; Scott-Finan, Nancy  
**Subject:** Re: Urgent

October 06

-----Original Message-----

**From:** Burton, Faith  
**To:** Hertling, Richard; Scott-Finan, Nancy  
**Sent:** Wed Feb 28 12:10:17 2007  
**Subject:** RE: Urgent

I do not recall any contact by USA Iglesias; I can check my notes if we have a time frame.

-----Original Message-----

**From:** Hertling, Richard  
**Sent:** Wednesday, February 28, 2007 12:07 PM  
**To:** Scott-Finan, Nancy; Burton, Faith  
**Subject:** Re: Urgent

Was that an Oklahoma case?

-----Original Message-----

**From:** Scott-Finan, Nancy  
**To:** Hertling, Richard; Burton, Faith  
**Sent:** Wed Feb 28 12:05:14 2007  
**Subject:** RE: Urgent

I am trying to recall. There was contact with one of the Western States USAs about either an environmental or Indian case. I receive reports about Members reaching out to the USAs about cases all too frequently and have to return calls with the "neither confirm nor deny" or provide the public record pleadings.

-----Original Message-----

**From:** Hertling, Richard  
**Sent:** Wednesday, February 28, 2007 11:59 AM  
**To:** Scott-Finan, Nancy; Burton, Faith  
**Subject:** Urgent

Was either of you ever contacted by NM US Attorney Iglesias last year alerting you to contacts he received from 2 MCs on a specific case?



**Moschella, William**

---

**From:** Nowacki, John (USAEO) [John.Nowacki@usdoj.gov]  
**Sent:** Wednesday, February 28, 2007 5:27 PM  
**To:** Sampson, Kyle; Goodling, Monica; Moschella, William; Elston, Michael (ODAG); Hertling, Richard  
**Subject:** FW: house subpoena

FYI -- From Bud Cummins.

---

**From:** Battle, Michael (USAEO)  
**Sent:** Wednesday, February 28, 2007 5:04 PM  
**To:** Nowacki, John (USAEO)  
**Subject:** FW: house subpoena

FYI.

---

**From:** Bud Cummins [mailto:bud.cummins@aael.net]  
**Sent:** Wednesday, February 28, 2007 4:50 PM  
**To:** Battle, Michael (USAEO)  
**Subject:** house subpoena

Mike,

FYI, house committee called today saying they intend to subpoena me and others (I didn't ask who) for next Tuesday, March 6. If I have any legal obligations to run this somehow through DOJ please let me know. If someone at DOJ wants to talk before the testimony, I am available to do that also.

Best regards,

Bud

**Bud Cummins**  
Consultant

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DAG000001058

**Moschella, William**

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**From:** Hertling, Richard  
**Sent:** Wednesday, February 28, 2007 5:29 PM  
**To:** Nowacki, John (USAEO); Sampson, Kyle; Goodling, Monica; Moschella, William; Elston, Michael (ODAG)  
**Subject:** RE: house subpoena

thanks. The others to be subpoenaed are Lam, McKay, and Iglesias.

---

**From:** Nowacki, John (USAEO) [mailto:John.Nowacki@usdoj.gov]  
**Sent:** Wednesday, February 28, 2007 5:27 PM  
**To:** Sampson, Kyle; Goodling, Monica; Moschella, William; Elston, Michael (ODAG); Hertling, Richard  
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Bud

**Bud Cummins**  
Consultant

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**March 02, 2007**  
**Friday**

9:15 AM - 9:45 AM

9:15 AM - 9:45 AM

9:45 AM - 10:00 AM

9:45 AM - 10:00 AM

10:00 AM - 11:00 AM

10:30 AM - 11:30 AM

11:30 AM - 1:00 PM

House Judiciary Committee Hearing Prep -- Room 4208 RFK  
-William Moschella  
-Michael Elston  
-Monica Goodling  
-Richard Hertling  
-Nancy Scott-Finan  
-Brian Roehrkasse  
-John Nowacki

1:00 PM - 1:30 PM

1:30 PM - 2:30 PM

Moschella, William

1

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**Moschella, William**

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**From:** Roehrkasse, Brian  
**Sent:** Sunday, March 04, 2007 8:17 PM  
**To:** Scolinos, Tasia; Sampson, Kyle; Elston, Michael (ODAG); Hertling, Richard; McNulty, Paul J; Moschella, William  
**Subject:** Senator Domenici Calls

I spoke with the Washington Post and New York Times and left a message with an AP reporter. I gave verbal comments in line with the facts below.

Senator Domenici called the Attorney General in September 2005 and January and April of 2006. During those calls, Senator Domenici - who initially recommended David Iglesias for the position - expressed general concerns about the performance of US Attorney Iglesias and questioned whether he was "up to the job." During the first week of October 2006, a similar and very brief call about the US Attorney's performance was placed to the Deputy Attorney General. At no time in these calls did the Senator mention the public corruption case.

**March 05, 2007**  
**Monday**

8:30 AM - 9:00 AM

9:15 AM - 9:45 AM

9:15 AM - 9:45 AM

9:45 AM - 10:00 AM

9:45 AM - 10:00 AM

10:00 AM - 10:30 AM

11:00 AM - 12:30 PM

House Judiciary Committee Hearing Prep -- ODAG Conference Room 4135  
Please Note: Changing the time of this meeting to 11:00.

- William Moschella
- William Mercer
- Kyle Sampson
- Michael Elston
- Monica Goodling
- Richard Hertling
- Nancy Scott-Finan
- John Nowacki
- Tasia Scolinos
- Brian Roehrkasse

12:30 PM - 2:00 PM

2:00 PM - 3:00 PM

3:00 PM - 4:30 PM

House Judiciary Committee Hearing Prep (continuation) -- ODAG Conference Room 4135

- William Moschella
- William Mercer
- Kyle Sampson
- Michael Elston
- Monica Goodling
- Richard Hertling
- Nancy Scott-Finan
- John Nowacki
- Tasia Scolinos
- Brian Roehrkasse

Moschella, William

**Moschella, William**

---

**From:** Oprison, Christopher G. [Christopher\_G.\_Oprison@who.eop.gov]  
**Sent:** Monday, March 05, 2007 9:33 PM  
**To:** Moschella, William  
**Cc:** Sampson, Kyle; Kelley, William K.; Scudder, Michael Y.; Fielding, Fred F.; Gibbs, Landon M.  
**Subject:** RE: Moschella Oral Testimony

**Attachments:** Moschella Oral Statement - MYS (2).doc



Moschella Oral  
Statement - MYS...

Will - attached please find a redlined version with suggested edits. Thanks

Chris

---

**From:** Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]  
**Sent:** Monday, March 05, 2007 8:43 PM  
**To:** Oprison, Christopher G.  
**Cc:** Moschella, William  
**Subject:** RE: Moschella Oral Testimony

Thx, Chris. Will now has the pen, so please send the comments to him directly (but cc me, if you would). Thx!

---

**From:** Oprison, Christopher G. [mailto:Christopher\_G.\_Oprison@who.eop.gov]  
**Sent:** Monday, March 05, 2007 8:40 PM  
**To:** Sampson, Kyle  
**Subject:** RE: Moschella Oral Testimony

we are gathering comments and should have this back to you shortly

---

**From:** Sampson, Kyle [mailto:Kyle.Sampson@usdoj.gov]  
**Sent:** Monday, March 05, 2007 7:25 PM  
**To:** Kelley, William K.  
**Cc:** Oprison, Christopher G.  
**Subject:** Moschella Oral Testimony  
**Importance:** High

Bill, can you forward this on to Dana and Cathie (and whomever else in the White House you deem appropriate) for review and approval? Thanks!

<<Moschella Oral Statement.doc>>

Kyle Sampson



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U.S. Department of Justice  
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(202) 305-5289 cell  
kyle.sampson@usdoj.gov